Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1998

ROBERT D. KRUMME, *et al.*,

Petitioners,

vs.

WESTPOINT STEVENS INC., formerly known as WEST POINT-PEPPERELL, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari in the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Where a qualified pension plan, which is contained in a formal plan document and that provides that it may only be amended by the board of directors, specifies in the plan document the actuarial factors used to calculate pension benefits:

1. Does an employer's change of actuarial factors by administrative action of a plan committee, without board amendment of the plan document, violate the requirement of 26 U.S.C. § 401(a)(25) and Revenue Ruling 79-90 that actuarial assumptions used to calculate benefits must be specified in a benefit plan in a manner that precludes employer discretion?

2. Can an employer retroactively decrease pension plan benefits by increasing the discount rate used to calculate lump sum pension benefits through administrative action when the same action, if effectuated by board amendment of the plan, would be a violation of 29 U.S.C. § 1054(g), 26 U.S.C. § 411(d)(6), 26 C.F.R. § 1.411(d)(6)-3(b), 26 C.F.R. § 1.411(d)-4, Q&A 1:(a)(3) and Revenue Ruling 81-12, which prohibit retroactive reductions in accrued pension benefits?

3. Can minutes of a pension plan committee that concededly has no authority to amend a pension plan be deemed part of the pension plan document, where the pension plan itself defines the pension plan document as a particular physical document with subsequent amendments approved by the board of directors?

LIST OF PARTIES

This case was originally commenced as two cases that were consolidated for appeal to the Court of Appeals. The original case was *Robert D. Krumme v. WestPoint-Pepperell, Inc.*, commenced in 1989. The second case was *Gordon E. Allen et al. v. WestPoint-Pepperell, Inc., C. Powers Dorsett and D. Michael Roark*, commenced in 1990. As consolidated, the petitioners include:

Robert D. Krumme
Gorden E. Allen
John Currier
James L. Dunne
Leo Fornero
Gerard P. Mandry
Norman K. Matheson
Bruce E. Moore
Nicholas Pallotta
Cockran B. Supplee

Respondents include:

WestPoint Stevens Inc. (formerly known as WestPoint-Pepperell, Inc.)
C. Powers Dorsett
D. Michael Roark

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in this proceeding on May 1, 1998.

OPINION BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-37a) is reported at 143 F.3d 71 (2d Cir. 1998). Relevant opinions of the District Court are reported at 908 F. Supp. 1209 (S.D.N.Y. 1995) (App., *infra*, 44a-80a), and 1996 WL 257633 (S.D.N.Y. May 15, 1996) (App., *infra*, 40a-43a).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on May 1, 1998. App., *infra*, 38a. A timely petition for rehearing with a suggestion for rehearing in banc was denied on July 8, 1998. App., *infra*, 81a. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

26 U.S.C. § 401(a)(25) provides:

> (25) **Requirement that actuarial assumptions be specified.**
>
> A defined benefit plan shall not be treated as providing definitely determinable benefits unless, whenever the amount of any benefit is to be determined on the basis of actuarial assumptions, such assumptions are specified in the plan in a way which precludes employer discretion.

26 U.S.C. § 411(d)(6) provides:

> (6) **Accrued benefit not to be decreased by amendment.**
>
> (A) **In general** — A plan shall be treated as not satisfying the requirements of this section if the accrued benefit of a participant is decreased by an amendment of the plan, other than an amendment described in section 412(c)(8), or section 4281 of the Employee Retirement Income Security Act of 1974.

29 U.S.C. § 1054(g)(1) provides:

§ 1054(g) Decrease of accrued benefits through amendment of plan

(1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) or 1441 of this title.

29 U.S.C. § 1102(a)(1) & b(3), (4) provides:

§ 1102 Establishment of plan

(a) Named fiduciaries

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

* * *

(b) Requisite features of plan
Every employee benefit plan shall

* * *

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

29 U.S.C. § 1002(21)(A) provides:

21(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with

respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

26 C.F.R. § 1.401-1(b)(1)(i) provides in pertinent part:

(b) *General Rules.* (1)(i) A pension plan within the meaning of section 401(a) is a plan established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to his employees over a period of years, usually for life, after retirement.

26 C.F.R. § 1.411(d)-3(b) provides:

§ 1.411(d)-3 Other special rules.

(b) *Prohibition against accrued benefit decrease.* Under § 411(d)(6) a plan is not a qualified plan (and a trust forming a part of such plan is not a qualified trust) if a plan amendment decreases the accrued benefit of any plan participant, unless the plan amendment satisfies the requirements of section 412(c)(8) (relating to certain retroactive amendments) and the regulations thereunder. For purposes of determining whether or not any participant's accrued benefit is decreased, all the provisions of a plan affecting directly or indirectly the computation of accrued benefits which are amended with the same adoption and effective dates shall be treated as one plan amendment. Plan provisions indirectly affecting accrued benefits include, for example, provisions relating to years of service and breaks in service for determining benefit accrual, and to actuarial factors for determining optional or early retirement benefits.

26 C.F.R. § 1.411(d)-4, Q&A 1 provides in pertinent part:

§ 1.411(d)-4 § 411(d)(6) protected benefits.

Q-1: What are "section 411(d)(6) protected benefits"?

A-1: (a) *In general.* The term "Section 411(d)(6) protected benefit" includes any benefit that is described in one or more of the following categories —

* * *

(3) Optional forms of benefit described in section 411(d)(6)(B)(ii)

Such benefits, to the extent they have accrued, are subject to the protection of section 411(d)(6) and, where applicable, the definitely determinable requirement of section 401(a) (including section 401(a)(25)) and cannot, therefore, be reduced, eliminated, or made subject to employer discretion except to the extent permitted by regulations.

26 C.F.R. § 1.411(d)-4, Q&A 5 provides:

§ 1.411(d)-4 § 411(d)(6) protected benefits.

Q-5: When will the exercise of discretion by some person or persons, other than the employer, be treated as employer discretion?

A-5: For purposes of applying the rules of this section and § 1.401(a)-4, the term "employer" includes plan administrator, fiduciary, trustee, actuary, independent third party, and other persons. Thus, if a plan permits any person, other than the participant (and other than the participant's spouse), the discretion to deny or limit the availability of a section 401(a), including section 411(d)(6) protected benefit for which the employee is otherwise eligible under the plan (but for the exercise of such discretion), such plan violates the requirements of sections 401(d)(6) and, where applicable, the definitely determinable requirement of section 401(a), including section 401(a)(25).

STATEMENT OF THE CASE

Background

The case involves a dispute over the calculation of lump sum deferred compensation benefits paid to ten former executives of Cluett Peabody

& Company ("Cluett"), a company that was acquired by WestPoint-Pepperell, Inc. (now known as WestPoint Stevens Inc.) ("WestPoint"). The deferred compensation had been in annuity form based on identical individual contracts that were subsequently amended to require a lump sum payment upon a change in control of WestPoint (the "EPI Amendment"). The amount of the lump sum payments depended on actuarial assumptions, including a discount rate assumption, contained in Cluett's qualified pension plan (the "Cluett Plan"), which rate was to be employed by the EPI Amendment. The size of the discount rate had an inverse relationship to the size of the lump sum payments: The higher the discount rate the smaller the payments.

Prior to losing a hostile takeover fight for control of WestPoint, on February 16, 1989, WestPoint's senior executives, acting as Cluett's Pension Committee (the "Committee"), purported to increase the discount rate contained in the Cluett Plan from a fixed 5% to a variable rate that at all relevant times was 9.3%. This increase in rate reduced by up to approximately one-half the lump sum benefits due to the Cluett employees. The central issue addressed by the Court of Appeals was whether the Committee was authorized by the Cluett Plan to change the discount rate, or whether the Cluett Plan, as well as certain revenue rulings, regulations and statutes applied to pension plans under ERISA and the Internal Revenue Code ("IRC"), required that such a change be made by a Plan amendment adopted by WestPoint's board of directors.

Before December 31, 1983, the Cluett Plan did not set forth specific actuarial assumptions, like the discount rate, in the Plan document. Rather, it allowed the Committee by administrative action to adopt actuarial assumptions such as the discount rate "from time to time." App., *infra*, 7a. In 1979 the Internal Revenue Service issued Revenue Ruling 79-90, which requires that whenever a benefit is to be determined on the basis of actuarial assumptions, those assumptions "must be specified within the plan in a manner which precludes employer discretion." Revenue Ruling 79-90, 1979-1 C.B. 155, 156 ("79-90"). This aspect of 79-90 was subsequently codified at 26 U.S.C. § 401(a)(25). The effect of 79-90 and 26 U.S.C. § 401(a)(25) was that: (1) actuarial factors, like discount rates, used to calculate benefits were required to be actually stated in the benefit plan document; (2) once so-stated, the factors could be changed only pursuant to the amendment procedure prescribed by the benefit plan; (3) such an amendment would be covered by the substantive and procedural requirements that ERISA and the IRC impose on plan

amendments; and (4) discretionary, non-amendatory changes to the actuarial assumptions specified in the plan document were strictly prohibited.

Although issued in 1979, 79-90 granted a grace period, ending December 31, 1983, for pension plans to comply. The Cluett Plan was amended by the Cluett board in November 1983 specifically to comply with 79-90 by specifying in the physical Cluett Plan itself the actuarial assumptions used to calculate pension benefits. The 5% discount rate was added to the original text, and the 1983 amendment left unchanged the language permitting the Committee to adopt actuarial assumptions "from time to time," thus leaving the Committee with an advisory role but no longer with the authority to implement a new rate.[1] This created for a stranger to the Plan's governance, however, an apparent conflict between the Cluett Plan's designation of its board of directors as the sole authority to amend the Cluett Plan, including the actuarial assumptions stated in the Plan, and the Committee's administrative authority.[2]

The Proceedings Below

This case was originally brought in the United States District Court for the Southern District of New York as two diversity cases, *Krumme* v. *WestPoint-Pepperell, Inc.* and *Allen et al.* v. *WestPoint-Pepperell, Inc. et al.* The cases were subsequently consolidated for appeal to the Court of Appeals.

Upon motion of the *Allen* plaintiffs, the District Court granted summary judgment on the issue of whether WestPoint's Committee lacked authority to increase the discount rate specified in the Cluett Plan.[3] App., *infra*, 44a. That ruling was subsequently applied for the benefit of plaintiff

1. The purpose of the 1983 amendment which embedded the actuarial assumptions into the Cluett Plan was uncontroverted. In fact, defendant filed a Determination Letter Application with the IRS in 1985 explicitly reporting that compliance with 79-90 was the reason for the 1983 amendment. *See* App., *infra*, 7a.

2. In the proceedings below, WestPoint acknowledged, and the District Court and the Court of Appeals found, that the Cluett Plan granted exclusive authority to amend the Plan to the board of directors. App., *infra*, 8a,70a.

3. Based on a purely contractual analysis of the Cluett Plan, the District Court initially denied plaintiffs' motion for summary judgment. After reargument, the District Court employed an ERISA-centered analysis, reversed itself, and withdrew its earlier opinion.

Krumme pursuant to the doctrine of collateral estoppel. *Id.* at 40a. The starting point for the District Court's analysis was this Court's fundamental observation in *Curtiss-Wright Corporation* v. *Schoonejongen*, 514 U.S. 73, 83 (1995), of ERISA's "core functional requirement" that every benefit plan be established and maintained pursuant to a written instrument "to allow an employee *'on examining the plan documents*, [to] determine exactly what his rights and obligations are under the plan,' " *Id.* at 69a, (*quoting*, H.R. Rep. No. 93-1280, p. 297 (1974) U.S. Code Cong. & Admin. News pp. 4639, 5077, 5078). The District Court also highlighted, as did this Court in *Curtiss-Wright*, ERISA's further requirement that a benefit plan specify a procedure for amending the plan and for identifying the persons with authority to amend. App., *infra*, 70a; 514; U.S. at 78; 29 U.S.C. § 1102(b)(3).

The District Court held that after the 5% discount rate was physically embedded in the Cluett Plan by a board amendment, it could, under ERISA, only be changed by the amendment procedure specified in the Cluett Plan. App., infra, 71a. The District Court further noted that ERISA provided beneficiaries with important safeguards with respect to amendments, such as pre- and post-amendment notification requirements and a prohibition against retroactive decreases in accrued benefits. *Id.* at 70a n.24. Finally, the District Court found that the Cluett Plan explicitly provided the board of directors with exclusive authority to amend the Plan, that the board undisputedly did not act to amend the Cluett Plan, and thus that the 5% discount rate was never validly changed and remained, at all relevant times, the rate specified by the Cluett Plan. *Id.* at 72a-73a.

In reaching its conclusions the District Court was aware of and distinguished the Seventh Circuit's holding in *Dooley* v. *American Airlines, Inc.* 797 F.2d 1447 (7th Cir. 1986). The benefit plan in *Dooley* was much like the Cluett Plan *prior to the Cluett Plan's November 1983 amendment* in that both allowed the employer to change actuarial assumptions "from time to time" and neither specified the assumptions in the plan document. The *Dooley* court held that changes in a discount rate made prior to 79-90's December 31, 1983 effective date could be made by discretionary administrative action but that such a discretionary grant of authority would not comply with 79-90 after its effective date. The District Court cited *Dooley* for the proposition that before the actuarial assumptions were specified in the Cluett Plan document to comply with

Revenue Ruling 79-90, they could be changed without amendment. The District Court held, however, that after the actuarial assumptions were added to the Cluett Plan in 1983, an amendment to the Plan adopted in accordance with the Plan's amendment provisions was required. App., *infra*, 72a.

The Court of Appeals reversed. The Court of Appeals also acknowledged the core requirements for a written plan document and specific amendment procedures recognized in *Curtiss-Wright*. App., *infra*, 28a. The Court of Appeals then circumvented these requirements by holding that the Cluett Plan nevertheless authorized a change in discount rate without a plan amendment.

In so holding the Court of Appeals relied principally on its reading of *Dooley*. It construed *Dooley* as holding that a change to a discount rate pursuant to a provision allowing the rate to be set from "time to time" did not require or constitute a plan amendment. App., *infra*, 29a-30a. The Court of Appeals rejected the argument that *Dooley's* holding was valid only for pre-December 31, 1983, pension plans that had not yet complied with 79-90 by specifying actuarial assumptions in the plan document. *Id.* at 30a-31a. Without distinguishing or even acknowledging *Dooley's* own holding that the *Dooley* benefit plan would violate the "anti-discretion" proscription of 79-90 after 79-90's effective date, the Court of Appeals found that *Dooley* established a "'commonsensical rule of law'" that survived the Revenue Ruling. *Id.* at 30a.

The Court of Appeals also held that WestPoint's retroactive reduction of pension benefits by raising the discount rate did not violate ERISA's prohibition of retroactive benefit reductions by plan amendment, since the discount rate increase was not a plan amendment. App., *infra*, 32a. The Court of Appeals further held that ERISA's requirement that a benefit plan be in a written document was satisfied because the changed discount rate was memorialized in minutes the Court of Appeals determined to be part of the Cluett Plan document. *Id.* at 31a. In so holding, the Court of Appeals did not attempt to explain how its holding harmonized with the Cluett Plan's explicit definition of the Plan as a specific physical document "as it may be amended from time to time."

Finally, the Court of Appeals held that although 79-90 required actuarial assumptions to be specified in a benefit plan, it did not require all changes to those assumptions to be by formal plan amendment. The

Court of Appeals opined that 79-90 only eliminated a employer's discretion to choose actuarial factors *ad hoc*, but did not go on to explain why a Committee's use "from time to time" of factors other than the factors actually specified in the formal Plan document was anything different than an *ad hoc* and prohibited exercise of discretion. App., *infra*, 31a-32a.

REASONS FOR GRANTING THE WRIT

The Second Circuit completely misread *Dooley*, and in the process has made a shambles of the finely reticulated scheme devised by Congress, the Department of Labor and the Internal Revenue Service to prevent discretionary, retroactive decreases in accrued pension benefits. The Second Circuit's holding that an employer may retain authority to change, from time to time and without amendment, actuarial factors specified in a benefit plan document without violating 26 U.S.C. § 401(a)(25) and Revenue Ruling 79-90 conflicts directly with *Dooley* v. *American Airlines, Inc.*, 797 F.2d 1447 (7th Cir. 1986), and is contrary to this Court's recent decisions identifying discretionary employer action upon which ERISA imposes fiduciary obligations. The Second Circuit's holding that the benefit plan document includes minutes from a Committee that concededly had no amendatory authority conflicts with *Frank* v. *Colt Industries, Inc.*, 910 F.2d 90 (3d Cir. 1990). The decision below is erroneous. Moreover, the decision conflicts with and, in fact, dangerously undermines the unwaivering judicial and regulatory emphasis on pension benefit certainty, which protects both participants and administrators and is an important issue that has regularly been addressed in recent years by this Court.

I.

THE COURT OF APPEALS' APPLICATION OF 26 U.S.C. § 401(a)(25) AND REVENUE RULING 79-90 CONFLICTS WITH *DOOLEY v. AMERICAN AIRLINES CORPORATION* AND WITH THIS COURT'S RECENT DECISIONS REGARDING PENSION PLANS

The Court of Appeals relied principally on *Dooley* v. *American Airlines Corporation*, 797 F.2d 1447 (7th Cir. 1986), in holding that the retention of authority by an employer to change actuarial assumptions "from time to time" without a plan amendment does not violate the employer discretion prohibitions of 79-90 and 26 U.S.C. § 401(a)(25).

In fact, the Court of Appeal's decision conflicts squarely with *Dooley*.

The American Airlines plan in *Dooley* and the Cluett Plan contained nearly identical language relating to discretionary authority for changing actuarial assumptions. The American Airlines plan provided for the determination of lump sum benefits on the basis of actuarial factors "approved from time to time by American Airlines. . . ." 797 F.2d at 1451. Similarly, the Cluett Plan called for the use of actuarial factors "as shall be adopted from time to time by the [Cluett Pension Plan] Committee on the advice of the Actuary." App., *infra*, 7a.[4] In both cases the employer sought to decrease benefits by raising the discount rate. The *Dooley* court found the company's administrative action changing the discount rate was valid solely because it occurred during 79-90's grace period. However, the Seventh Circuit in *Dooley* clearly found that the such a grant of discretionary authority violated the employer discretion prohibitions of 79-90 and would be invalid after the grace period ended:

> There can be no question either that the [American Airlines] Plan was in existence on March 12, 1979 [the date Revenue Ruling 79-90 was issued], or that, on that date, the Plan *was not in compliance with the employer discretion prohibitions* contained in Revenue Ruling 79-90.

797 F.2d at 1452-53 (emphasis added). *Dooley's* holding in this regard was not dictum. Revenue Ruling 79-90 provided that any pension plan that complied with 79-90 on the date of its issuance, March 1979, could not find refuge in the grace period provided by 79-90. It was thus necessary for the Seventh Circuit to find that the American Airlines plan was not in compliance with the Revenue Ruling on March 12, 1979, in order to rule that American Airline's December 1979 discretionary change of the discount rate was saved from being invalid by the grace period that continued until December 31, 1983.

The Court of Appeals' conflict with *Dooley* is significant. Prior to the December 31, 1983 effective date of 79-90, disputes over changes to actuarial factors were common. *See, e.g., Dooley, supra*, 797 F.2d 1447; *Whitaker* v. *Texaco Inc.*, 729 F. Supp. 845 (N.D. Ga. 1989); *Korn* v.

4. That the American Airlines plan refers to the "employer" and the Cluett Plan to a "Committee" is a meaningless distinction. For purposes of determining whether impermissible discretion exists, the two terms are synonymous. *See* 26 C.F.R. § 1.411(d)-4, Q&A 5.

Levine Brothers Iron Work Corporation, 574 F. Supp. 836, 843 n.8 (S.D.N.Y. 1983). After 79-90 became effective and was subsequently codified, these disputes disappeared. Certain lingering disputes, like *Dooley*, were litigated after 1983, but these disputes pertained to actions that occurred prior to the end of 79-90's grace period. The certainty provided by 79-90 and 26 U.S.C. § 401(a)(25) — that actuarial factors must be specified in the plan document and cannot be changed by discretionary, *i.e.*, nonamendatory, action — apparently eliminated this area of conflict. Indeed, petitioners are aware of no case concerning post-1983 facts that has addressed an employer's ability to change actuarial factors without amending a benefit plan.

The Court of Appeals decision upsets the certainty imposed by 79-90 and 26 U.S.C. § 401(a)(25) and has set the state of the law back some 15 years. The Second Circuit's decision also conflicts with decisions issued by this Court in recent years that have sharpened the distinction between discretionary, fiduciary actions and nondiscretionary plan amendments.

In recent cases this Court has identified the existence of an ERISA fiduciary duty by focusing on whether the alleged fiduciary acted in a discretionary, administrative capacity or was involved in plan design. In *Varity Corp.* v. *Howe*, 516 U.S. 489 (1996), this Court observed that ERISA defined a fiduciary as one who " 'exercises any discretionary authority or discretionary control respecting management' of the plan, or 'has any discretionary authority or discretionary responsibility in the administration' of the plan." *Id.* at 498, *(quoting*, 29 U.S.C. § 1002(21)(A)); *accord Lockheed Corporation* v. *Fink*, 517 U.S. 882, 890-91 (1996); *Siskind* v. *Sperry Retirement Program, Unisys*, 47 F.3d 498, 505 (2d Cir. 1995).

While the decision to amend a plan also involves an exercise of discretion in a broad sense, this Court has held that an employer does not act as a fiduciary in amending a plan. *Lockheed, supra*, 517 U.S. at 890-91. *Accord, Varity, supra*, 516 U.S. at 505; *Curtiss-Wright, supra*, 514 U.S. at 78. Rather, where an employer is involved in plan design, adoption, amendment or termination, it has been analogized to the settlor of a trust, who does not act in a fiduciary capacity. *Lockheed, supra*, 517 U.S. at 890-91; *Abbott Pipefitters Local Union No. 522*, 94 F.3d 236, 239 (6th Cir. 1996), *cert. denied* 117 S. Ct. 948 (1997).

This Court's distinction between discretionary management or administrative action and plan design or amendment applies neatly to the prohibition against employer discretion contained in 26 U.S.C. § 401(a)(25) and 79-90: Actuarial factors may be prospectively changed by an amendment that observes ERISA and plan requirements for amendments but may not be changed by discretionary action. *See also Siskind* v. *Sperry Retirement Program, Unisys*, 47 F.3d 498, 505 (2d Cir. 1995) (employer is not a fiduciary when amending plan but is a fiduciary when exercising discretionary administrative authority); *See also*, 29 U.S.C. § 1002(21)(A)(i).

II.

THE SECOND CIRCUIT'S DECISION WOULD MAKE A SHAMBLES OF, AND IS IN CONFLICT WITH, THE FINELY RETICULATED SCHEME ESTABLISHED UNDER ERISA AND THE IRC TO SAFEGUARD ACCRUED PENSION BENEFITS

The Second Circuit's decision will have serious adverse repercussions on pension plans well beyond the confines of the present dispute. Congress, the Treasury Department and the Labor Department have adopted a finely reticulated scheme of statutes, regulations and rulings designed to insure that employees can learn their rights and obligations from the face of plan documents, to identify the types of accrued benefits that should be protected and to prevent reductions of such accrued benefits.

This Court has recently observed that ERISA has "an elaborate scheme in place for enabling beneficiaries to learn their rights and obligations at any time, a scheme that is built on reliance on the face of written plan documents." *Curtiss-Wright*, *supra*, 514 U.S. at 83. In *Curtiss-Wright*, the Court highlighted the "core functional requirements" that a benefit plan must " 'be established and maintained pursuant to a written instrument,' " to enable an employee " 'on examining the plan documents, determine exactly what his rights and obligations are under the plan.' " *Id.* (*quoting* 29 U.S.C. § 1102(a)(1) and H.R. Rep. No. 93-1280, p. 297 (1974) U.S. Code Cong. & Admin. News pp. 4639, 5077, 5078).

In order to secure the integrity of the written plan instrument, ERISA further requires that each plan specify "a procedure for amending such plan and for identifying the persons who have authority to amend the plan." 29 U.S.C. § 1102(b)(3); *see Curtiss-Wright, supra*, 514 U.S. at 78-79. This Court has ruled, moreover, that "whatever level of specificity a company ultimately chooses, in an amendment procedure or elsewhere, it is bound to that level." *Id.* at 85; *accord, Inter-Modal Rail Employees Association* v. *Atchison, Topeka & Santa Fe Railway Company*, 520 U.S. 510 (1997).

In addition to these protections, ERISA also contains various other provisions designed to assure participants that they will ultimately receive their promised benefits. *See Lockheed, supra*, 517 U.S. at 887 (1996). One such provision is the so-called "anti-cutback" provision that prohibits plan amendments that retroactively reduce or eliminate accrued benefits. 29 U.S.C. § 1054(g)(1); *see also* 26 U.S.C. § 411(d)(6) (IRS provision that also prohibits reductions of accrued benefits). With respect to lump sum payments, and more particularly actuarial factors used to calculate such benefits, the statutory and regulatory scheme is even more refined.

ERISA and the IRC require that pension benefits be "definitely determinable," or "specify the basis" on which payments are made. 26 C.F.R. § 1.401-1(b)(1)(i); 29 U.S.C. § 1102(b)(4). Prior to December 31, 1983, despite the specificity requirements of ERISA and the IRS, benefit plans did not normally state in the plan document the actuarial factors used for benefit calculations. Revenue Ruling 79-90 was issued in March 1979 (with a grace period for compliance through December 31, 1983) to remedy that lack of specificity. 79-90 requires, in pertinent part, that whenever a benefit calculation "requires the use of actuarial assumptions (interest, mortality, *etc.*) the assumptions to be used must be specified in a manner which precludes employer discretion." Revenue Ruling 79-90, 1979-1 C.B. 155, 156. In 1984, this requirement was codified at 26 U.S.C. § 401(a)(25). Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1451. This prohibition of discretionary changes is quite broad and prohibits discretionary action by plan administrators, fiduciaries and actuaries — indeed virtually anyone other than the employee participant or his or her spouse. 1979-1 C.B. 155, 156 ("employer discretion includes discretion of the employer, plan administrator, fiduciary, actuary, *etc.*"); 26 C.F.R. § 1.411(d)-4, Q&A 5

(plan that gives discretion to anyone but participant or spouse violates 26 U.S.C. § 411(d)(6) and 26 U.S.C. § 401(a)(25)).

While 79-90 (and subsequently, 26 U.S.C. § 401(a)(25)) resolved that discretionary, *i.e.*, administrative, changes to actuarial assumptions were prohibited, it left unresolved to what extent, and under what restrictions, such changes could be effected by plan amendment. *See* 1979-1 C.B. 155, 156 (Ruling does not consider whether any change in specified assumptions by plan amendment violates 26 U.S.C. § 411(d)(6)). Other rulings and regulations, however, clarified that plan amendments could change actuarial assumptions, but only prospectively.

The "anti-cutback" provisions, § 204(g) of ERISA, 29 U.S.C. § 1054(g), and § 411(d)(6) of the IRC, 26 U.S.C. § 411(d)(6), have been construed to prohibit "decreases" in optional lump sum payments by increasing discount rates. Section 1.411(d)-3(b) of the IRC regulations, which also construes § 204(g) of ERISA,[5] specifies that plan provisions that indirectly affect the computation of an accrued benefit are subject to the restrictions on the decrease of accrued benefits. 26 C.F.R. § 1.411(d)-3(b). The regulation further explicitly provides that "[p]lan provisions indirectly affecting accrued benefits include, for example, provisions relating to . . . actuarial factors for determining optional or early retirement benefits." *Id.*

The restrictions of 29 U.S.C. § 1054(g)(1), 26 U.S.C. § 411(d)(6) and 26 C.F.R. § 1.411(d)-3(b) as they relate to changes in discount rates were explained in Revenue Ruling 81-12. 1981-1 C.B. 228. 81-12 referred to 79-90's requirement that actuarial bases must be specified in a plan document as either fixed or variable standards that can be changed by amendment. 81-12 explained that any amendment of an actuarial factor

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5. IRS regulations and rulings regarding § 411 of the Internal Revenue Code are equally applicable to § 204 of ERISA, 29 U.S.C. § 1054. § 411(d)(6) of the Internal Revenue Code is essentially identical to § 204(g) of ERISA, 29 U.S.C. § 1054(g). Indeed, when these two sections were amended in 1984, they were amended by the same section of the Retirement Equity Act. Pub. L. No. 98-397, 98 Stat. 1450-51. Moreover, since 1978 the authority to issue regulations and rulings with respect to many sections of ERISA, including § 204, has been transferred from the Secretary of Labor to the Secretary of the Treasury. Reorganization Plan No. 4 of 1978, § 101, 43 Fed. Reg. 47713; *Williams* v. *Cordis Corp.*, 30 F.3d 1429, 1431 (11th Cir. 1994); *Hollingshead* v. *Burford Equipment Co.*, 747 F. Supp. 1421, 1433 (M.D. Ala. 1990).

would be subject to the anti-cutback restrictions of § 411(d)(6). 81-12 noted that amendments could, prospectively, decrease actuarial factors, but that any such amendment must safeguard the actuarial equivalent value of those regular benefits that had already accrued at the time of the amendment.

When § 204(g) of ERISA and § 411(d)(6) of the IRC were identically amended by Congress' adoption of the Retirement Equity Act in 1984, 79-90 and 81-12 were cited as the prevailing law. Pub. L. No. 98-397, 98 Stat. 1450-51. Following adoption of the Retirement Equity Act, the Treasury Department promulgated § 1.411(d)-4, which further defined the scope of the IRC's and ERISA's "anti-cutback" provisions. 26 C.F.R. § 1.411(d)-4. The regulation explicitly included optional forms of benefits, such as lump sum payments, as "section 411(d)(6) protected benefits" that cannot "be reduced, eliminated, or made subject to employer discretion except to the extent permitted by regulations." 26 C.F.R. § 1.411(d)-4, Q&A l: (a)(3).

The regulatory scheme that controls the change of actuarial assumptions, although set out in a web of statutes, regulations and rulings, is thus quite simple: Actuarial assumptions must be physically specified in the pension plan document; once specified, the assumptions cannot be changed by discretionary administrative action but can be changed by an amendment that complies with the plan's amendment provisions; and, any such amendment is governed by important safeguards such as disclosure requirements and the "anti-cutback" rule that prohibits a retroactive decrease in accrued benefits.

The regulatory scheme is built on the threshold assumption that changes to plan benefits are either discretionary (*i.e.*, administrative), or amendatory. The Court of Appeals' opinion renders ERISA's and the IRC's regulatory scheme a nullity by recognizing a type of employer action that the Court of Appeals deems to be neither discretionary nor amendatory. In essence, the Second Circuit allows any employer completely to circumvent the prohibitions against decreasing accrued benefits by amendment by simply reserving to itself the right to change a pension plan without amending it. Such a scheme would allow an employer through committee action to cut back accrued benefits in a way that would not be allowed by board amendment. The result reached by the Second Circuit is wholly irrational, and makes a mockery of a

carefully constructed regulatory scheme that was designed to avoid just such an outcome.

III.

THE COURT OF APPEAL'S DETERMINATION THAT MINUTES OF A COMMITTEE WITH NO AMENDATORY AUTHORITY CONSTITUTED PART OF THE FORMAL PLAN DOCUMENT CONFLICTS WITH *FRANK v. COLT INDUSTRIES, INC.*

Aware that 79-90 and 26 U.S.C. § 401(a)(25) require actuarial factors to be specified in a pension plan, and completely ignoring the language of the plan document itself, the Court of Appeals held that the Committee minutes constituted part of the Plan document. App., *infra*, 31a. This holding is wrong and conflicts with *Frank* v. *Colt Industries, Inc.*, 910 F.2d 90 (3d Cir. 1990).

In *Colt*, the Third Circuit was called upon to determine whether certain minutes should be considered part of a plan document and thus sufficient to change the terms of the plan. *Id.* at 97-99. The Third Circuit held that the minutes did not amend the plan and that ERISA required that they not be considered part of the plan. *Id.* at 99. In so holding the Third Circuit stated:

> Where an employer has created an integrated document setting forth the terms of a benefit plan, . . . not every internal document containing a reference to management's interpretation of the plan should be regarded as a part of the plan itself. Where a plan has complied with ERISA by setting forth a method for accomplishing amendment, of course each putative amendment will be evaluated by reference to that method.

Id. at 98. The Third Circuit further observed that Colt itself did not consider the questioned minutes to be amendments and would not have included them in responding to a request for the plan document. *Id.*

The Second Circuit's decision is squarely in conflict with *Colt*. In the present case, as in *Colt* the Cluett Plan contained a formal amendment procedure, and the Committee minutes concededly did not comply with that procedure and did not amend the plan. App., *infra*, 7a-8a. Moreover, similarly to *Colt*, when WestPoint stipulated early in this case as to the

documents that constituted the Cluett Plan, it included the 1986 restated version of the Plan and all subsequent amendments, but did not include the Committee minutes.

Despite similar circumstances, the Second Circuit reached a decision completely at odds with *Colt*, and in doing so has set a dangerous precedent that should be reversed. That the Second Circuit's decision substantially undermines the ERISA "scheme that is built around reliance on the face of written plan documents," *Curtiss-Wright*, *supra*, 514 U.S. at 83, is acutely demonstrated in the present case. At the time of the rate change in question, the basic Cluett Plan document was a 1986 restated version of the Plan. That document specifically defined the Plan as the 1986 document, "as it may hereafter be amended from time to time." Had a Cluett Plan participant or administrator asked for the Plan, as it defined itself, he or she would have received the 1986 document that specified a 5% discount rate and a number of subsequent amendments, none of which changed the 5% discount rate.

Because of its explicit self-definition, the Cluett Plan presented an even stronger case than in *Colt* for excluding extraneous documents. Indeed, if extraneous documents can be deemed part of the plan document where, as here, the pension plan includes an explicit definition of the plan and a formal, exclusive amendment procedure, it is difficult to conceive of any plan that can preserve its own integrity. Under ERISA, this Court's own decisions and *Colt*, a participant or administrator should be able to rely on readily identifiable documents if ERISA's finely reticulated scheme is to function properly. Under the Second Circuit's conflicting decision, however, such reliance would be misplaced and ERISA's "written plan" requirement would be rendered ineffective.

IV.

THE COURT OF APPEAL'S DECISION IS ERRONEOUS

The legislative scheme established under ERISA and the IRC, and this Court's own decisions compel the conclusion that (1) actuarial factors used to calculate pension benefits must be specified in the plan document; (2) any action to change factors so specified can only be either discretionary or amendatory; (3) discretionary changes to discount rates are prohibited; and (4) amendatory changes must comply with various disclosure and "anti-cutback" rules. The Second Circuit's holdings (i)

that the change to the discount rate specified in the Cluett Plan was neither discretionary nor amendatory, (ii) that the Committee had authority to change the discount rate specified in the Cluett Plan; and (iii) that the minutes of a committee that concededly lacked any authority to amend the Cluett Plan are part of the plan document, are erroneous.

First, the Court of Appeals badly misapplied *Dooley* and a line of cases it deemed analogous. App., *infra*, 29a-30a. It is true that where ERISA and the IRC permitted employers to exercise discretion in setting actuarial factors prior to 1984, *Dooley* and other cited cases hold that a fiduciary may exercise such discretion in selecting actuarial factors without amending the plan. 797 F.2d at 1451. But since 1983, no such discretion has been allowed in setting actuarial factors used to calculate benefits. Accordingly, *Dooley* also clearly holds that the exercise of such a provision without a plan amendment would not, after December 31, 1983, comply with the anti-discretion provision of 79-90. *Id.* at 1452-53. The other cases cited by the Court of Appeals — *Whitaker* v. *Texaco, Inc.*, 729 F. Supp. 845 (N.D.Ga. 1989); *Oster* v. *Barco of California Employees' Retirement Plan*, 869 F.2d 1215, 1219 (9th Cir. 1988); *Stewart* v. *National Shopmen Pension Fund*, 730 F.2d 1552, 1561 (D.C. Cir. 1984); *Holian* v. *Leavitt Tube Co.*, 1989 WL 44570, at *4 (N.D. Ill. April 28, 1989) — are also inapposite to the present case because they involve either a change in discount rate prior to 1984, when employer discretion was allowed, or they address actions, such as choosing valuation dates, where neither ERISA nor the IRC prohibit the exercise of employer discretion.

Dooley squarely ruled that operation of a provision allowing administrative changes in actuarial factors "from time to time" did not comply with the employer discretion restrictions of 79-90. 797 F.2d at 1452-53. Similarly, *Whitaker* also addressed a pre-1984 change in discount rate and thus did not apply 79-90, but it highlighted that such a change was indeed discretionary: "[I]f the provision itself gives the fiduciary *discretion*, then exercising that *discretion* is obviously not an amendment of a provision. . . ." 729 F. Supp. at 851. (Emphasis changed).

Moreover, in light of this Court's recent decisions, particularly *Lockheed*, *Varity* and *Curtiss-Wright*, the Second Circuit's attempt to circumvent 26 U.S.C. § 401(a)(25) and 79-90 by deeming the Cluett Committee's change in discount rate to involve neither a plan amendment nor administrative discretion is simply not sustainable. Petitioners

respectfully submit that the Committee's perceived ability to set actuarial factors "from time to time" would be deemed by this Court to be a fiduciary act precisely because it calls for discretionary administrative action. *Dooley* and the text of 79-90 and 26 U.S.C. § 401(a)(25), as well as *Curtiss-Wright* and other contemporaneous cases from this Court, require a finding that the Committee's change of the discount rate specified in the Cluett Plan without amending the plan was an exercise of employer discretion and was thus prohibited by 79-90 and 26 U.S.C. § 401(a)(25).

Second, the requirements of ERISA combined with the provisions of the Cluett Plan itself compel the conclusion that the discount rates embedded in the Cluett Plan could only be altered by a plan amendment. In the proceedings below, it was undisputed that the Cluett Plan was amended in November 1983, specifically to comply with 79-90. App., *infra*, 7a. Once the actuarial factors, including the 5% discount rate, were written into the Cluett Plan they could only be altered by a formal plan amendment.

As ERISA required, the Cluett plan specified a procedure for amending the Plan and identifying the persons with authority to amend. *See* 29 U.S.C. § 1102(b)(3). The Cluett Plan explicitly granted the board of directors *exclusive* authority to amend the Plan. App., *infra*, 7a-8a. As instructed by *Curtiss-Wright*, once the company chose the board as the exclusive amending authority, it was "bound to that level" of specificity. 514 U.S. at 85; *see also, Inter-Model Rail Employees Association*, *supra*, 520 U.S. 510, 117 S. Ct. 1513, 1516; ("An employer may, of course, retain the unfettered right to alter its promises, but to do so it must follow the formal procedures set forth in the plan.") The Court of Appeals thus erred in holding that WestPoint could alter the discount rate set forth in the Cluett Plan without a board amendment to the Plan.

Third, the Court of Appeal's determination that the Committee minutes constituted a plan document, was contrary to an explicit provision of the Cluett Plan that the Second Circuit failed to acknowledge. 26 U.S.C. § 401(a)(25) and 79-90 require that actuarial factors be specified in a plan. The Court of Appeals deemed that requirement fulfilled by ruling that the Committee minutes were part of the plan documents. App., *infra*, 37a. As noted above, the Cluett Plan, which was retyped and restated into a single document in 1986, explicitly defined the Plan as the 1986 document "as it may hereafter be amended from time to time."

The definition is not ambiguous: The Cluett Plan consisted of the 1986 restated plan document and any subsequent amendments. To allow superfluous committee minutes to be considered part of the plan document undermines the rationale recognized in *Curtiss-Wright* for the "core functional requirement" of a written instrument: That an employee may with reasonable certainty determine what his or her rights and obligations are by examining the plan documents. 514 U.S. at 83.

V.

THE ISSUES PRESENTED ARE IMPORTANT

In recent years, this Court has addressed pension plan issues with regularity. This Court has often commented that ERISA is a " 'comprehensive and reticulated statute,' the product of a decade of congressional study of the Nation's private employee benefit system." *Mertens* v. *Hewitt Associates*, 508 U.S. 248, 251 (1993), (*quoting Nachman Corp.* v. *Pension Benefit Guaranty Corporation*, 446 U.S. 359, 361 (1980)). This Court has further observed that in enacting ERISA, Congress " 'wanted to . . . mak[e] sure that if a worker has been promised a defined pension benefit upon retirement . . . he actually will receive it." *Id.* In cases like *Curtiss-Wright, supra*, 514 U.S. at 83, this Court has also highlighted that a principal way in which Congress has sought to safeguard pension benefits is by enacting a statutory scheme based on reliance upon a written plan document.

The integrity of written benefit plans is a matter of vital importance to the security of the pension system. The Second Circuit's decision does significant damage to this system in several respects. First ERISA and the IRC have prohibited decreases in accrued benefits by prohibiting discretionary administrative changes to actuarial factors and subjecting amendments of such factors to "anti-cutback" rules. The Second Circuit's decision will now allow an employer entirely to circumvent these restrictions by recognizing a form of action — which petitioners suggest is entirely foreign to recent decisions of this Court — that is neither discretionary nor amendatory. The Second Circuit has opened a dangerous loophole that this Court should quickly close.

The Second Circuit's decision has also undermined the integrity of plan documents by allowing superfluous writings to be part of the plan. While this Court has recently commented on several occasions on the necessity of following formal amendment procedures, it has not had

occasion to directly address the issue resolved in conflicting manners by *Colt* and the Second Circuit: whether documents that concededly do not conform to formal amendment procedures of an integrated pension plan can nevertheless be deemed part of the plan document. *Colt* and this Court's recent decisions appear to petitioners to require that such documents have no effect on a plan. The Second Circuit has ruled otherwise, and the present case gives this Court an opportunity to affirm *Colt*, expand on this Court's own prior decisions, and thus to preserve the integrity of formal written pension plans.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that a writ of certiorari issue to review the judgment of the Second Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED MAY 1, 1998

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1997

(Argued October 20, 1997 Decided May 1, 1998)

Docket Nos. 97-7312, 97-7384

ROBERT D. KRUMME,

Plaintiff-Appellee,

GORDON E. ALLEN; JOHN CURRIER; NICHOLAS PALLOTTA; JAMES J. DUNNE; LEO FORNERO; GERARD P. MANDRY; NORMAN K. MATHESON; COCHRAN P. SUPPLEE and BRUCE E. MOORE,

Plaintiffs-Appellees-Cross-Appellants,

—v.—

WESTPOINT STEVENS INC., formerly known as WEST POINT-PEPPERELL, INC.,

Defendant-Appellant-Cross-Appellee,

C. POWERS DORSETT and D. MICHAEL ROARK,

Defendants-Cross-Appellees.

Appendix A

Before:

WINTER, *Chief Judge*, MESKILL, *Circuit Judge*, and MARTIN, *District Judge*.*

This is a consolidated appeal from judgments rendered in the United States District Court for the Southern District of New York, Scheindlin, *J.*, in connection with two lawsuits: *Allen* v. *West Point-Pepperell, Inc.*, 90 Civ. 3841 (S.D.N.Y.), and *Krumme* v. *West Point-Pepperell*, 89 Civ. 2016 (S.D.N.Y.). At the heart of both lawsuits is a dispute among the parties over a pension plan committee's authority to adopt actuarial assumptions to be used in calculating an accelerated lump sum payment of future accrued retirement benefits. In *Allen*, the district court granted judgment for defendants on all claims in the complaint. In *Krumme*, the district court rendered judgment in favor of plaintiff Krumme on his breach of contract claim. In both *Allen* and *Krumme*, the district court awarded attorney's fees and costs to plaintiffs, with the amount of those fees and costs to be set after an appeal.

On its merits, we affirm the district court's judgment in *Allen*, but for reasons other than those espoused by the district court. On the merits in *Krumme*, we vacate the district court's judgment and remand for further proceedings consistent with this opinion. In both *Allen* and *Krumme*, because we conclude that we have no jurisdiction to review the grant of attorney's fees and costs to the plaintiffs until the amount of fees and costs have been assessed, we remand to the district court for the calculation of attorney's fees and costs.

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* Honorable John S. Martin, Jr., United States District Judge for the Southern District of New York, sitting by designation.

Appendix A

FRANCIS CARLING, New York City (Collazo Carling & Mish, New York City, Frederick A. Brodie, Daniel Z. Mollin, Lewis A. Polishook, Winthrop Stimson Putnam & Roberts, New York City, of counsel, *for Defendant-Appellant-Cross-Appellee WestPoint Stevens Inc.* and *Defendants-Cross-Appellees C. Powers Dorsett, D. Michael Roark* and *Appellant West Point-Pepperell, Inc. (now known as WestPoint Stevens Inc.).*

ROBERT J. HAUSEN, New York City (Christine P. Searl, Chadbourne & Parke, New York City, of counsel), *for Plaintiffs-Appellees-Cross-Appellants Gordon E. Allen, John Currier, Nicholas Pallotta, James J. Dunne, Leo Fornero, Gerard P. Mandry, Norman K. Matheson, Cochran P. Supplee* and *Bruce E. Moore.*

JAMES W. HARBISON, JR., New York City (Carolyn W. Jaffe, Morgan, Lewis & Bockius, New York City, of counsel), *for Plaintiff-Appellee Robert D. Krumme.*

MESKILL, *Circuit Judge*:

This is a consolidated appeal from judgments rendered in the United States District Court for the Southern District of New York, Scheindlin, *J.*, in connection with two lawsuits, *Allen* v. *West Point-Pepperell, Inc.*, 90 Civ. 3841 (S.D.N.Y.), and *Krumme* v. *West Point-Pepperell*, 89 Civ. 2016

(S.D.N.Y.). At the heart of this appeal is a dispute among the parties over a pension plan committee's authority to adopt actuarial assumptions in connection with calculating an accelerated lump sum payment of future accrued retirement benefits. Due to their factual complexity and the numerous legal issues arising in these bitterly contested lawsuits, our discussion of the factual background is extensive.

BACKGROUND

Consolidated on appeal are judgments from two lawsuits, *Allen* and *Krumme*. In *Allen*, the plaintiffs are nine former senior executives of Cluett, Peabody & Company (Cluett).[1] In *Krumme*, the plaintiff is Robert D. Krumme, Cluett's General Counsel until 1986 when he departed on West Point-Pepperell, Inc.'s (now know as WestPoint Stevens, Inc. and hereinafter referred to as "WestPoint") acquisition of Cluett. WestPoint is a Georgia textile and apparel manufacturer which acquired Cluett in 1986 and operated it as a wholly owned subsidiary until Cluett's merger into WestPoint on January 1, 1989. WestPoint eventually sold Cluett to Bidermann Industries U.S.A., Inc. in March 1990.

The sole defendant in *Krumme* is WestPoint. The *Allen* plaintiffs brought suit against WestPoint and D. Michael Roark, C. Powers Dorsett and Barry F. Shea, three WestPoint executives. Roark was Vice President of Human Resources for Cluett until 1986, and then Vice President of Human Resources for WestPoint until May 1989. At all relevant times, Dorsett was WestPoint's General Counsel. Barry F. Shea, WestPoint's Treasurer, originally was named as a

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[1] The plaintiffs in *Allen* are Gordon E. Allen, John Currier, James J. Dunne, Leo Fornero, Gerard P. Mandry, Norman K. Matheson, Bruce E. Moore, Nicholas Pallotta and Cochran B. Supplee (hereinafter the "*Allen* plaintiffs").

defendant and then was dropped from the complaint by stipulation on January 28, 1997.

1. *The EPI Amendment*

In 1975, Cluett established an employee benefit program for its senior executives, the Executive Permanent Insurance Program (EPI Program). Among other things, the EPI Program provided deferred compensation benefits to its participants. Upon reaching age 65, EPI Program participants would receive lifetime monthly payments equal to, on an annual basis, 30% of the participants' final base salary. Krumme and each of the *Allen* plaintiffs agreed to participate in the EPI Program.

On October 24, 1988, a wholly owned subsidiary of Farley, Inc. (Farley) initiated a tender offer for all outstanding shares of WestPoint common stock. By November 21, 1988, Farley controlled 35.17% of that stock. Threatened with a hostile takeover, WestPoint sought to protect the retirement benefits of EPI Program participants. *See Allen v. WestPoint-Pepperell*, 933 F.Supp. 261, 264 (S.D.N.Y. 1996) (finding that WestPoint sought to "protect participants in the event the company experienced a change in control") (hereinafter "*Allen I*"). Specifically, on November 11, 1988, WestPoint offered EPI Program participants an amendment to the EPI Program (EPI Amendment) under which the participants in the event of a "Change in Control,"[2] could choose a lump sum payment in an amount that would be the "Actuarial Equivalent" of their future stream of retirement benefits. The "Actuarial Equivalent" represented an amount having the "same present value" as the stream of retirement benefits

[2] A "Change in Control" occurred if, among other things, "any individual, corporation, . . . or other person . . . is or becomes the Beneficial Owner of Securities of WestPoint representing twenty percent (20%) or more of the combined voting power of Westpoint's then outstanding securities." EPI Amendment § 4A.(1)(g).

under the EPI Program. As an additional measure of protection for EPI Program participants, the EPI Amendment included a fee-shifting provision to reimburse EPI Program participants for their costs and attorney's fees incurred in connection with enforcing their rights under the EPI Program after a change in control, regardless of whether the participant is a prevailing party.[3]

2. *Calculating the Actuarial Equivalent*

EPI Amendment § 4A.(1)(c) established the basis for computing the "Actuarial Equivalent" of accrued retirement benefits. It states, in pertinent part:

> For the purpose of establishing whether a benefit is the Actuarial Equivalent of another benefit the *actuarial assumptions contained in Cluett's Employee Retirement Plan ["Cluett Plan"]* shall be employed for so long as that Plan remains in existence and if such Plan is no longer in existence, the actuarial assumptions last used by such Plan shall be used.

EPI Amendment § 4A.(1)(c) (emphasis added). Section 1.3 of the Cluett Plan sets forth the actuarial assumptions incorporated by section 4A.(1)(c). In November 1988, at the time the EPI Amendment was offered to EPI Program participants, section 1.3 provided:

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3 Section 16 of the EPI Amendment provided, in pertinent part, that

> [i]f at any time upon or after a Change of Control there should arise any dispute as to the validity, interpretation or application of any term of condition of [the EPI Program], . . . Cluett agrees, upon written demand by [a participant], . . . to pay . . . the [participant's] costs and reasonable attorneys' fees . . . incurred by the [participant] in connection with any dispute or litigation, regardless of whether the [participant] is the prevailing party, involving any provision of [the EPI Program].

EPI Amendment § 16.

Appendix A

"Actuarial Equivalent" means an amount of equal value when computed on the basis of interest, mortality and other tables as shall be adopted from *time to time by the [Cluett Pension Plan] Committee* on the advice of the Actuary, the current factors being as specified below:

1. *Mortality Table* The 1978 GAM Table (which is the 1971 Group Annuity Mortality Table projected to 1978 with Scale E). An average of male and female rates will be used.

2. *Interest rate* 5% per annum, compounded annually.

3. *Other factors* None.

Cluett Plan § 1.3 (first emphasis added).[4] The "Interest Rate" (hereinafter the "discount rate") is the rate at which the future stream of retirement benefits under the EPI Program is discounted to present value before distribution to participants in a lump sum form. The relationship between the discount rate and the amount of the lump-sum is inverse; the higher the discount rate, the less the EPI Program participant receives. *See Allen* v. *WestPoint-Pepperell*, 954 F.Supp. 682, 690 n.9 (S.D.N.Y. 1997) (explaining the relationship between the discount rate and size of lump sum payment). Notably, although the Cluett Pension Plan Committee (Cluett Committee) had the authority under section 1.3 to adopt new

[4] The above-quoted actuarial assumptions in section 1.3 were added to the Cluett Plan on November 22, 1983 by Cluett's Board of Directors. The Cluett Board amended section 1.3 and specified the actuarial assumptions to comply with Revenue Ruling 79-90. *See* Rev. Rul. 79-90, 1979 - 1 C.B. 155 (requiring that defined benefit plans, that provide optional forms of benefits that are "actuarially equivalent" to normal benefits, "specif[y] [actuarial assumptions] within the plan in a manner which precludes employer discretion" and setting December 31, 1983 as the deadline for compliance) (codified at 26 U.S.C. § 401(a)(25) (1994)) (hereinafter "Revenue Ruling 79-90"). Prior to the Cluett Board's amendment, Section 1.3 had consisted of the above-quoted language in section 1.3 without the portion commencing with "the current factors being as specified below;" the Cluett Pension Plan Committee simply adopted actuarial assumptions without specifying them in the Cluett Plan.

actuarial assumptions "from time to time," Cluett's Board of Directors (Cluett Board), under sections 11.1 and 9.1, reserved exclusive authority to amend the Cluett Plan.[5]

Within a few weeks after the EPI Amendment was offered, all of the plaintiffs in *Krumme* and *Allen* agreed to the terms of the EPI Amendment and opted to receive a single lump sum payment upon a change in control. Krumme, in returning his executed EPI Amendment to WestPoint, appended a cover letter dated December 9, 1988. It stated, in pertinent part: "Finally, I understand that the discount rate applicable under the Cluett Employee Retirement Plan is 5% and *that would be the basis on which our benefits would be calculated under this change of control payout*" (emphasis added). We now discuss the specific factual events underlying the disputes in *Allen* and *Krumme*.

3. *The Error Discovered in the EPI Amendment*

In early February 1989, WestPoint discovered a drafting error in the EPI Amendment. Section 4A.(1)(c) mistakenly had incorporated the actuarial assumptions contained in the *Cluett* Plan, and in particular a 5% discount rate that was well below market rate. *See Allen I*, 933 F.Supp. at 266 (finding that EPI Amendment's incorporation of the Cluett Plan's 5% discount rate was an error and was " 'totally inappropriate' given the high interest rates that prevailed at the time"). WestPoint, with respect to the EPI Amendment, had intended to incorporate the floating Pension Benefit Guaranty

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[5] Section 11.1 provides, in pertinent part:

> The Board of Directors reserves the right at any time, and from time to time, to modify or amend in whole or in part any or all of the provisions of the [Cluett] Plan, but no such amendment shall substantially change the rights to benefits which, ~~prior to such amendment, have become~~ fixed or matured by retirement, termination or death.

Cluett Plan § 11.1. Under section 9.1, the Cluett Board "ha[d] the sole authority to . . . amend or terminate, in whole or in part, the [Cluett] Plan."

Corporation (PBGC)-based discount rate contained in *WestPoint*'s Pension Plan. To correct this drafting error, WestPoint management determined that the Cluett Committee had the authority to change the discount rate in the Cluett Plan on advice of the Cluett Plan's actuary. *See* Cluett Plan § 1.3 (providing that the Cluett Committee was authorized to adopt new discount rates "from time to time . . . on the advice of the Actuary"); Cluett Plan § 9.6 (reaffirming the Cluett Committee's authority to alter the actuarial assumptions from time to time and providing that the "decisions and the records of the Committee shall be conclusive and binding upon the Company, Participants, and all other persons having any interest under the Plan").[6] In accordance with sections 1.3 and 9.6, WestPoint solicited from the Cluett Plan's actuary, TPF&C, a recommendation as to the discount rate to be used in the Cluett Plan.

On February 16, 1989, TPF&C recommended that the Cluett Plan's discount rate be changed from a fixed 5% rate to a floating rate calculated at 120% of the PBGC immediate interest rate, yielding, at all relevant times, a 9.3% discount rate (hereinafter "9.3% discount rate"). Accordingly, the

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[6] Section 9.6 states, in pertinent part, that the Cluett Committee has

> the exclusive right to interpret the Plan and to decide any matters arising thereunder in connection with the administration of the Plan. . . . Its decisions and the records of the Committee shall be conclusive and binding upon the Company, Participants, and all other persons having any interest under the Plan.
>
> The Committee shall adopt from time to time actuarial tables to be used as the basis for all actuarial calculations and shall determine from time to time the percentum rate or rates of interest to be used as the basis for calculations required in connection with the Plan. As an aid to the Committee, the Actuary appointed by the Committee shall make annual actuarial valuations of the assets and liabilities of the Plan and shall certify to the Committee the tables and rate or rates of interest which he would recommend for use by the Committee.

Cluett Plan § 9.6 (emphasis added).

Cluett Committee, on that same day, adopted TPF&C's recommendation and formally recorded this action in its minutes. At no relevant time, however, did the Cluett Board, which ceased to exist in January 1989, or the WestPoint Board of Directors ever vote to amend the actuarial assumptions in the Cluett Plan to reflect this change in the discount rate to 9.3%.

4. *The February 22, 1989 Releases*

WestPoint, upon adopting the 9.3% discount rate for the Cluett Plan, became concerned that some of the EPI Program participants had executed the EPI Amendment with the expectation that their lump sum benefits would be calculated at a 5% rate. *See Allen I*, 933 F.Supp. at 267. WestPoint therefore offered to rescind the EPI Amendment for those EPI Program participants who objected to the increase in the discount rate. Specifically, on February 22, 1989, defendant Roark sent a letter to each of the participants who had executed the EPI Amendment (hereinafter "February 22, 1989 Letter"). The February 22, 1989 Letter stated, in pertinent part:

> There has apparently been some confusion as to the method of calculation to be employed in determining the lump sum benefit under the [amended EPI Program]. Some participants have told us that they were led to believe that a 5% discount rate would be used to determine lump sum values. This is incorrect.

The letter continued that "[t]he formula under the Cluett Employee Retirement Plan which is referenced in the [EPI Amendment] calls for converting monthly annuities to lump sum amounts" with the 9.3% discount rate that had "been adopted for all plans of WestPoint Pepperell and its subsidiaries which provide for lump sum payouts upon a change

in control." The February 22, 1989 Letter requested that the EPI Program participants execute an appended election form in which they could either choose to execute a release of WestPoint and remain eligible to receive a lump sum payout at a 9.3% discount rate or rescind their agreement to the EPI Amendment. The letter also provided that, in the event of a change in control, no lump sum payment of the accrued deferred compensation would be made until the election form was returned. All of the *Allen* plaintiffs executed the release.[7] Krumme, however, refused and instead, in a series of letters in February and March 1989, protested the change in the discount rate to defendants Dorsett and Roark.

On February 23, 1989, WestPoint announced that it had entered into a definitive merger agreement with Farley. On April 5, 1989, Farley purchased approximately 95% of WestPoint's stock in connection with its tender offer. Deeming that a change in control had occurred on April 5, WestPoint on that same day sent to each of the *Allen* plaintiffs a check for an amount representing the lump sum payment of their accrued retirement benefits, calculated at a 9.3% rate. The letter accompanying the lump sum payout check stated that "[b]y cashing this check you acknowledge that [WestPoint's] obligation to make informal [EPI] payments has been fully satisfied" (hereinafter "April 5, 1989 Letter"). The *Allen* plaintiffs cashed their checks without protest. Krumme, who had not executed the release, did not receive a lump sum check.

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7 The release stated, in pertinent part:

> I understand that the lump sum payment of the actuarial equivalent of my deferred compensation benefit will be in full satisfaction of all obligations of West Point-Pepperell, Inc., as successor to Cluett, Peabody & Co., Inc., under the terms of my Deferred Compensation Agreement, and that in accepting a lump sum payment I shall thereby release West Point-Pepperell, Inc., its directors, officers, employees, and agents, and its successors and assigns, from all obligations under the Agreement.

Appendix A

5. *Pleadings and Pre-Trial Motions*

On March 24, 1989, Krumme filed a complaint against WestPoint. He alleged that a change in control occurred on February 23, 1989 when WestPoint entered into a definitive merger agreement with Farley. Furthermore, he claimed that (1) WestPoint breached its contractual obligation under the EPI Amendment to distribute his lump sum payment calculated at a 5% rate and to reimburse him for his legal expenses incurred in connection with his dispute with WestPoint, and (2) because Krumme executed the EPI Amendment in reliance on WestPoint's representations that 5% would be the rate at which the lump sum would be calculated, WestPoint should be estopped from asserting that the discount rate was 9.3%.[8] WestPoint, in its answer filed on May 8, 1989, alleged, among other affirmative defenses, that Krumme never entered into a contract with WestPoint in connection with the EPI Amendment.

In *Krumme*, WestPoint moved on October 2, 1989 for partial summary judgment, arguing, among other things, that no contract had been formed between Krumme and WestPoint in connection with the EPI Amendment. Specifically, WestPoint argued that Krumme's December 9, 1988 cover letter accompanying his executed EPI Amendment contained additional terms at variance with WestPoint's offer, thereby converting Krumme's acceptance into a rejection and counteroffer. In that December 9 letter, Krumme stated, "Finally, I understand that the discount rate applicable under the Cluett Employee Retirement Plan is 5% and that *would be* the basis on which our benefits *would be* calculated under this change of control

[8] The complaint also included a third claim for gross negligence and deceit on the theory that if the discount rate had in fact been 9.3% when Krumme executed the EPI Amendment, WestPoint had engaged in gross negligence and deceit by informing Krumme that the EPI Amendment incorporated a 5% discount rate. Krumme has abandoned this claim as the discount rate was indeed 5% at the time he executed the EPI Amendment.

payout" (emphasis added). WestPoint asserted that by virtue of Krumme's use of the term "would be," Krumme conditioned his acceptance of the EPI Amendment on the inclusion of the additional term that the 5% discount rate would be the exclusive rate at which his lump sum payment would be calculated, notwithstanding that the Cluett Plan and EPI Amendment clearly contemplated that the discount rate was subject to change.

Krumme filed a cross-motion for partial summary judgment on November 15, 1989. On April 19, 1990, the district court, Conboy, *J.*, in an unpublished order, granted partial summary judgment in favor of Krumme on the limited issue that Krumme and WestPoint had entered into a binding contract with respect to the EPI Amendment. The district court concluded that "the [December 9] letter set out the parties' understanding of how the provisions of the [EPI] Amendment would have been implemented had the 'Change in Control' occurred at the moment of the execution of the Amendment."

The *Allen* plaintiffs filed their action on June 6, 1990. Unbeknownst to defendants at the time, each of the *Allen* plaintiffs, by May 1990, had signed agreements with Krumme retaining him as their counsel. *See Allen I*, 933 F.Supp. at 267 (finding that "Krumme contacted several of the *Allen* Plaintiffs to encourage them to bring suit against WestPoint, and to discuss the possibility of their retaining him as counsel").[9] The *Allen* plaintiffs alleged that a change in control occurred on or before November 21, 1988 (when Farley controlled approximately 35.17% of WestPoint's common stock) and in no event later than February 23, 1989 (when WestPoint entered into a definitive merger agreement

[9] It is unclear from the record the date on which defendants first learned of Krumme's agreements with the *Allen* plaintiffs. The record indicates, however, that defendants knew of Krumme's agreement with the *Allen* plaintiffs at least as early as March 3, 1993, when Krumme testified in his deposition.

with Farley). Furthermore, the *Allen* plaintiffs alleged that WestPoint management had increased the discount rate not to correct a mistake in the EPI Amendment but to cut costs and attract a bid from a "white knight" buyout group in which WestPoint's management hoped to participate. The *Allen* plaintiffs alleged that defendants sought to obtain the February 22, 1989 releases in order to induce the EPI Amendment participants unwittingly to release WestPoint from its enforceable obligation to pay their lump sum payouts calculated at a 5% rate. The *Allen* plaintiffs also claimed that defendants' material misrepresentations and omissions in the February 22 and April 5, 1989 Letters induced them to sign the release forms, causing them to suffer damages in the amount of the difference in their lump sum payments calculated at a 9.3% rate as opposed to a 5% rate.

In connection with these allegations, the *Allen* plaintiffs brought several claims against defendants WestPoint, Roark and Dorsett, alleging that (1) WestPoint breached its contractual obligation to pay their lump sum benefits calculated at a 5% rate and to reimburse them for their costs and attorney's fees; (2) defendants breached their fiduciary duty to act with due care and without self-dealing when they secretly increased the discount rate to increase WestPoint's value in contemplation of a buyout bid; (3) defendants committed fraud in connection with the February 22 and April 5, 1989 Letters by misrepresenting and omitting material information concerning the terms of the EPI Amendment;[10] and (4) West-

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[10] The *Allen* plaintiffs alleged that defendants' misrepresentations included, *inter alia*, statements that (a) the discount rate was 9.3% when in fact the proper discount rate was 5%; (b) the change in control had occurred on April 5, 1989 when in fact, a change in control had occurred as early as November 21, 1988; (c) the *Allen* plaintiffs were "confused" and mistaken in their belief that a 5% discount rate had been incorporated into the EPI Amendment.

Furthermore the *Allen* plaintiffs alleged that defendants failed to disclose, among other things, that (a) the discount rate had been increased to 9.3% on

Point violated New York labor law as the difference between the lump sum payments calculated at a 9.3% and 5% rate represented unpaid "wages," *see* N.Y. Lab. Law §§ 190-99 (McKinney 1986). The *Allen* plaintiffs also sought a declaratory judgment against WestPoint to rescind the releases they had executed pursuant to the February 22, 1989 Letter. They argued that rescission was appropriate in view of the parties' mutual mistake or the *Allen* plaintiffs' unilateral mistake that 9.3% represented the governing discount rate and that a change in control had not occurred until April 5, 1989.

On August 3, 1990, the defendants in *Allen* moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(6), arguing that as a matter of law, the *Allen* plaintiffs had released defendants from liability for all of their claims. On January 25, 1991, the district court, Conboy, *J.*, dismissed the complaint in its entirety. On September 11, 1991, we reversed and remanded for further proceedings. *See Allen* v. *WestPoint-Pepperell*, 945 F.2d 40 (2d Cir. 1991), *rev'g* 1991 WL 8505 (S.D.N.Y. Jan. 25, 1991). On September 27, 1991, defendants in *Allen* filed their answer to the complaint and raised several affirmative defenses, including that the *Allen* plaintiffs' claims were barred by their releases and that defendants Roark and Dorsett, who were acting within the scope and course of their employment as agents of WestPoint, could not be held personally liable for fraud and breach of fiduciary duty.

In August 1995, on cross-motions for partial summary judgment in *Allen*, the district court, Scheindlin, *J.*, to whom the cases had been reassigned, concluded that the Cluett Committee, under well settled principles of contractual interpretation, had the authority to adopt a new discount rate for the Cluett Plan. The *Allen* plaintiffs moved for reargument,

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February 16, 1989; and (b) the discount rate had been increased in an attempt to increase the attractiveness of WestPoint to a buyout group.

asserting that ERISA law governed the district court's interpretation of the Cluett Plan. On November 6, 1995, the district court granted the motion for reargument, withdrew its August 1995 order, and issued a new order concluding that, under ERISA, the Cluett Committee had no authority to change the discount rate and that the 5% discount rate "was at all relevant times one of the actuarial assumptions 'contained in' the Cluett Pension Plan for purposes of the EPI Amendment." *Allen* v. *West Point-Pepperell*, 908 F.Supp. 1209, 1222-23 (S.D.N.Y. 1995) (hereinafter "*Allen II*"), *withdrawing and superseding*, 1995 WL 463128 (S.D.N.Y. Aug. 4, 1995). The district court reasoned that because the Cluett Committee, in adopting a new discount rate, had modified a specified plan term (the 5% rate), the Committee's action was valid under ERISA only insofar as it complied with Cluett Plan amendment procedures. *See Allen II*, 908 F.Supp. at 1221 (citing 29 U.S.C. § 1102(b)(3) (requiring plan to "provide a procedure for amending the plan, and for identifying the persons who have authority to amend the plan")); *Coleman* v. *Nationwide Life Ins. Co.*, 969 F.2d 54, 58-59 (4th Cir. 1992) ("[A]ny modification to a plan must be implemented in conformity with the formal amendment procedures and must be in writing."), *cert. denied*, 506 U.S. 1081 (1993); *Alday* v. *Container Corp. of America*, 906 F.2d 660, 665 (11th Cir. 1990) (plan may be changed only in conformity with formal amendment procedures). The authority to amend the Cluett Plan resided exclusively in the Cluett Board. The Cluett Board, however, had never formally amended section 1.3 of the Cluett Plan to reflect the new 9.3% rate. Consequently, the district court concluded that 5% remained as the governing discount rate at all relevant times.

6. *Bench Trial on Four Issues*

The parties in both *Allen* and *Krumme* tried four issues to the district court: (1) the date of the change in control; (2) whether the *Allen* plaintiffs were entitled to have their releases rescinded on the basis of mutual mistake; (3) whether WestPoint, under the EPI Amendment, was obligated to reimburse Krumme and the *Allen* plaintiffs for their costs and attorney's fees incurred in connection with investigating and litigating their disputes with WestPoint; and (4) whether the February 22 and April 5, 1989 Letters misrepresented material information and failed to disclose material information concerning the terms of the EPI Amendment.

On January 3, 1996 the district court issued a joint opinion in both *Allen* and *Krumme*, concluding that the change in control of WestPoint to Farley had occurred on April 5, 1989. *See Allen* v. *WestPoint-Pepperell*, 1996 WL 2004, at *6 (S.D.N.Y. Jan. 3, 1996). This decision is not appealed.

On the issue of rescission, on May 15, 1996, the district court declined to rescind the *Allen* plaintiffs' releases on the basis of mutual mistake. *See Allen I*, 933 F.Supp. at 269. The district court concluded that a rescission of the releases would provide the *Allen* plaintiffs with an "undeserved and unintended windfall" as WestPoint, under the outdated 5% discount rate, would be "forced to pay the *Allen* Plaintiffs nearly twice the market-based present value of their EPI benefits." *Id.*

In that same May 13, 1996 opinion, the district court concluded that the *Allen* plaintiffs and Krumme were entitled to recover their costs and attorney's fees under the EPI Amendment. *See Allen I*, 933 F.Supp. at 270; EPI Amendment § 16 (providing that EPI Program participants would be reimbursed for their costs and attorney's fees expended in connection with disputes "arising" upon or after a change in

control). The district court reasoned that the plaintiffs were not entitled to a lump sum payment until a change in control had occurred. *See* EPI Amendment § 4A.1(2) (providing that *upon a change in control*, EPI Amendment participants are entitled to a lump sum payout). Prior to a change in control, therefore, the plaintiffs had no "legally cognizable dispute" over the terms of their lump sum payments. *Allen I*, 933 F.Supp. at 270. Accordingly, although Krumme had filed his present lawsuit on March 24, 1989, before the April 5th change in control, the district court concluded that neither Krumme's nor the *Allen* plaintiffs' "dispute" with WestPoint arose until April 5.

In *Krumme*, the district court, on October 22, 1996, deferred the computation of the costs and attorney's fees payable to Krumme until after appeal. Similarly, on February 27, 1997, the district court deferred the computation of the attorney's fees and costs payable to the *Allen* plaintiffs until after an appeal. On May 2, 1997, the district court certified to us, pursuant to 28 U.S.C. § 1292(b), the question whether parties may appeal a nonfinal decision to award attorney's fees and costs before their amounts have been assessed.[11] On May 5, 1997, WestPoint, without opposition, moved this Court to accept the certified question for decision. We denied WestPoint's motion to certify on June 10, 1997.

Finally, on the question of misrepresentation, the district court on January 28, 1997 rejected the *Allen* plaintiffs' three common law claims for constructive fraud, negligent misrepresentation, and fraudulent omission. *See Allen* v. *West*

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[11] Specifically, the district court asked:

> May the parties take an immediate appeal where the District Court has found that one party has a contractual right to attorneys' fees and expenses, where all other issues going to the merits of the case have been resolved, and where all that remains for decision is the amount of such fees and expenses?

Point-Pepperell, 954 F.Supp. 682, 688-94 (S.D.N.Y. 1997) (hereinafter "*Allen III*").[12] The district court concluded that the *Allen* plaintiffs had not established, for any of the three multi-pronged common law causes of action, the requisite elements necessary to support a judgment in their favor. In particular, the *Allen* plaintiffs had not established that they relied on defendants' misrepresentations to their detriment, an element required for all three common law claims. *See id.* at 696 n.15. The district court gave collateral estoppel effect to its May 13, 1996 decision that the EPI Amendment was intended "to provide participants with the actual present value of their benefits under the EPI Program," that rescission of the releases would provide the *Allen* plaintiffs with a "windfall" and that a 5% rate would force WestPoint to pay the *Allen* plaintiffs "nearly twice the market-based present value of their EPI benefits." *Allen I*, 933 F.Supp. at 268-69; *Allen III*, 954 F.Supp. at 696 ("[P]laintiffs were not harmed by use of the 9.3% discount rate because the rate satisfied the original intent of the parties—to provide EPI participants with the actual present value of their benefits upon a change of control.").

In *Krumme*, on February 20, 1996, WestPoint moved for leave to amend its answer to add an affirmative defense of

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[12] This opinion was later amended and reissued on February 11, 1997 to correct two minor textual errors. Inexplicably, it appears that only the pre-amended, January 28 opinion has been published in the Federal Supplement. We amend the two errors here (the page references are to *Allen III*, 954 F.Supp. 682 (S.D.N.Y. 1997)):

(1) on page 692, second column, sixteen lines down from the top of the page, the sentence is amended to read, "(5) that plaintiffs had the option of challenging . . . . ."

(2) on page 697, first column, nine lines down from the subsection V, **Attorneys' Fees**, the sentence beginning with "*Defendants* have announced their intention . . . ." is amended to read, "Defendant WestPoint has announced its intention to challenge this Court's determination that it must pay plaintiffs' attorneys' fees."

estoppel on the grounds that Krumme, as Cluett's General Counsel, had supervised Cluett's 1983 amendment to section 1.3 of the Cluett Plan and had represented to WestPoint in 1985 that the Cluett Plan was in compliance with ERISA. WestPoint argued therefore that Krumme should be estopped from arguing that the Cluett Committee's authority to adopt new actuarial assumptions under section 1.3 violated ERISA. WestPoint also sought to add counterclaims (1) to rescind the EPI Amendment as the incorporation of the Cluett Plan's 5% discount rate was a mistake; (2) to reform the EPI Amendment to incorporate the actuarial assumptions contained in *WestPoint*'s Employee Retirement Plan instead of Cluett's Plan; (3) for legal malpractice against Krumme because (a) Krumme had negligently supervised the Cluett Board's amendment to section 1.3 in 1983, resulting in a provision that violated ERISA, and (b) Krumme breached his duty to his former client, Cluett (and to WestPoint as Cluett's successor), by soliciting the *Allen* plaintiffs to sue WestPoint on matters substantially related to the subject matter of Krumme's former representation of Cluett; and (5) for breach of contract because Krumme was bound by an implied duty to exercise due care in the performance of his duties on behalf of Cluett and to refuse employment adverse to his former client on matters substantially related to Krumme's work for Cluett.

On May 15, 1996, the district court denied WestPoint's motion to amend. The district court concluded that "the proposed amendments are based on facts known to Defendant since 1989." *See Krumme* v. *West Point-Pepperell*, 1996 WL 257633, at *1 (S.D.N.Y. May 15, 1996). Furthermore, "[d]efendant ha[d] offered no adequate excuse for its delay in seeking to amend its answer. Moreover, it is readily apparent that the proposed amendments would require a new wave of discovery and would substantially delay the resolution of

this action." *Id.* In this same opinion, the district court granted Krumme's motion for partial summary judgment on his breach of contract claim. *Id.* The court gave collateral estoppel effect to its November 1995 conclusion in *Allen II* that the Cluett Committee, under ERISA, had no authority to change the discount rate and that the Cluett Plan's discount rate remained 5% at all relevant times. *Id.*

On February 11, 1997, judgment was entered for Krumme in the amount of $535,206.76, the total of Krumme's lump sum payment calculated at a 5% rate plus contractual pre-judgment interest. Krumme also was awarded costs and attorney's fees from WestPoint in an amount that was to be determined after appeal. In *Allen*, judgment on the merits on all claims in the complaint was rendered in favor of the defendants on February 27, 1997.[13] Like Krumme, the *Allen* plaintiffs were entitled to recover their costs and attorney's fees from WestPoint with the amount of those costs and fees to be determined after appeal.

WestPoint filed timely notices of appeal in *Krumme* and *Allen* on March 12, 1997 and March 24, 1997, respectively. The *Allen* plaintiffs filed notice of cross-appeal on March 27, 1997. By Order dated April 17, 1997, we consolidated the *Allen* and *Krumme* appeals.

7. *Arguments Raised on Appeal*

With respect to the judgment in *Allen*, WestPoint appeals from the district court's conclusion that 5% represented the governing rate at which to calculate the *Allen* plaintiffs' lump sums. *See Allen II*, 908 F.Supp. at 1223. Although this conclusion did not affect the outcome in *Allen*, as judgment was

[13] The *Allen* plaintiffs do not appeal the judgment in favor of defendants on their claims for breach of fiduciary duty and violation of New York labor law. We therefore deem these claims abandoned.

ultimately rendered for WestPoint, it did provide the basis, by way of collateral estoppel, for the district court's grant of summary judgment in favor of Krumme on his breach of contract claim. WestPoint argues that (1) the Cluett Committee's adoption of the 9.3% discount rate did not constitute a plan amendment and, therefore, Cluett Board action was not required under ERISA; (2) because the *Allen* plaintiffs pleaded no claim under ERISA in the complaint, they are barred from pursuing a claim or remedy under ERISA; (3) ERISA law is irrelevant to determine the Cluett Committee's authority to adopt actuarial factors because benefits due under the "top hat" EPI Program are at issue, not the Cluett Plan; (4) because the Cluett Committee has "the exclusive right to interpret the [Cluett] Plan and to decide any matters arising thereunder in connection with the administration of the Plan," its decisions under the Cluett Plan are entitled to deference, *see* Cluett Plan § 9.6, and (5) the *Allen* plaintiffs were not entitled to be reimbursed by WestPoint for their costs and attorney's fees.[14]

In opposition to WestPoint, the *Allen* plaintiffs and Krumme raise several arguments: (1) Revenue Ruling 79-90 requires that new actuarial assumptions be adopted exclusively pursuant to a plan's formal amendment procedures; (2) those responsible for administering the Cluett Plan since the Cluett Committee's purported adoption of the 9.3% rate have adhered to the 5% rate, demonstrating that the discount rate

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[14] WestPoint also argues that in the event we determine that the Cluett Committee had no authority under ERISA to adopt a new discount rate for the Cluett Plan, the Cluett Committee's action was voidable, not void *ab initio*, and therefore remained valid until successfully challenged by the plaintiffs. *See Murphy* v. *Keystone Steel & Wire Co.*, 61 F.3d 560, 569 (7th Cir. 1995) ("[T]echnical violations of ERISA . . . do not justify relief absent a showing of bad faith, active concealment, or detrimental reliance."). Because we conclude that the Cluett Committee in fact had authority to adopt the 9.3% discount rate, we do not reach or consider this argument.

was never changed;[15] (3) WestPoint, in its pleadings, stipulations, and statements of counsel, has admitted that (a) the Cluett Committee minutes were not part of the Cluett Plan; (b) the actuarial assumptions could be changed only by Cluett Board amendment; and (c) the relevant actuarial assumptions are those printed in section 1.3 of the Cluett Plan document; and (4) even if the Cluett Commmittee validly adopted the 9.3% rate, WestPoint, under 29 U.S.C. § 1054(g), was required to use a blended discount rate in calculating the lump sum payouts, *i.e.*, a 5% discount rate for benefits accrued through February 15, 1989 and the 9.3% rate for benefits accrued after February 16, 1989. *See* 29 U.S.C. § 1054(g)(1) ("The accrued benefit of a participant under a plan may not be decreased by an *amendment* of the plan." (emphasis added)).

With respect to the judgment in *Krumme*, WestPoint argues that (1) the parties in *Krumme* never entered into a binding contract in connection with the EPI Amendment; (2) the district court abused its discretion by denying WestPoint's motion for leave to amend its answer; and (3) Krumme was

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[15] For example, on April 24, 1989, WestPoint used a *5% discount rate* in connection with calculating a lump sum payment for a retiring employee, Virginia Mansfield. This payment, unlike the one the *Allen* plaintiffs each received, was distributed pursuant to Ms. Mansfield's retirement under the Cluett Plan, not a change in control under the EPI Amendment.

In addition, after Cluett was sold to Bidermann Industries in 1990, TFP&C was replaced with a new actuary, The Wyatt Company, whose duties included the calculation of benefits due to Cluett employees under the Cluett Plan. Donald Parsons, Jr. of Wyatt, stated in an affidavit that as of January 1993 the discount rate contained in section 1.3 of the Cluett Plan was 5%.

Furthermore, the *Allen* plaintiffs argue that if the discount rate in fact had been increased from 5% to 9.3%, they were entitled to, but never received, notice from WestPoint. *See* 29 U.S.C. § 1024(b)(1) (summary of a material modification to terms of plan must be furnished to plan participants no later than 210 days after the end of the plan year in which the modification is executed).

not entitled to be reimbursed by WestPoint for his attorney's fees and costs.[16]

On appeal, the *Allen* plaintiffs argue that the district court erred in concluding (1) that they failed to establish the requisite element of their common law fraud claims and, in particular, that they had not been harmed by the adoption of the 9.3% rate; and (2) that they were not entitled to have their releases rescinded on the basis of mutual mistake. In connection with the fraud and rescission claims, the *Allen* plaintiffs challenge the district court's factual findings that (a) the incorporation of the Cluett Plan's 5% discount rate in the EPI Amendment was a mistake; (b) that the Cluett Committee adopted the 9.3% discount rate to correct this "mistake;" and (c) that the enforcement of the 5% discount rate would result in an undeserved windfall for the *Allen* plaintiffs.

As discussed below, we conclude that the Cluett Committee effectively adopted a 9.3% discount rate on February 16, 1989, that the EPI Amendment incorporated this 9.3% rate, and that the *Allen* plaintiffs' lump sum payments were calculated properly at a 9.3% rate. Because the *Allen* plaintiffs' rescission and fraud claims both were predicated on the theory that 5% represented the proper discount rate at which to calculate their lump sum payouts under the EPI Amendment, we affirm the district court's judgment on the merits without reaching these claims. In *Krumme*, we vacate the judgment and remand for further proceedings in light of our decision. We conclude that we have no appellate jurisdiction to review the district court's award of attorney's fees and costs to Krumme and to the *Allen* plaintiffs until the district court has

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[16] WestPoint also argues that the district court in *Krumme* wrongfully gave collateral estoppel effect to its conclusion in *Allen II* that the Cluett Committee had no authority under ERISA to change the discount rate and that it remained 5%. Because we conclude that the Committee had authority to adopt the 9.3% rate and vacate the district court's judgment in *Krumme*, we do not reach or consider this argument.

set the actual amount of those fees and costs. We therefore remand to the district court for the calculation of attorney's fees and costs.

DISCUSSION

We have jurisdiction to review the merits of the judgments in *Allen* and *Krumme* before the district court has resolved the issue of attorney's fees and costs. *See Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988) (adopting "a uniform rule that an unresolved issue of attorney's fees for the litigation in question does not prevent judgment on the merits from being final"); *Farkas* v. *Rumore*, 101 F.3d 20, 22 (2d Cir. 1996) (per curiam) ("[W]here an order disposes of a party's substantive claims, but does not dispose of claims relating to attorney's fees, the time for appeal of the substantive claims starts to run from the date of the first order unless the district court explicitly grants a delay." (citations omitted)). As we explain below, however, we do not have jurisdiction to review the district court's award of attorney's fees to Krumme and to the *Allen* plaintiffs until the actual amount of fees and costs have been set.

1. *Contract Formation Between Krumme and WestPoint*

WestPoint appeals the district court's grant of summary judgment in favor of Krumme on the issue of contract formation. Specifically, WestPoint argues that Krumme conditioned his acceptance of the EPI Amendment on the inclusion of an additional term that the 5% discount rate would be the exclusive rate at which his lump sum payment would be calculated, notwithstanding that the EPI Amendment and the Cluett Plan clearly contemplated that the discount rate was subject to change.

We review *de novo* the district court's grant of summary judgment, *see Sayers* v. *Rochester Tel. Corp. Supplemental Mgmt. Pension Plan*, 7 F.3d 1091, 1094 (2d Cir. 1993), and construe all "inferences to be drawn from the underlying facts . . . in the light most favorable to the party opposing the motion," *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation and internal quotation marks omitted). We do not resolve disputed issues of fact but determine whether genuine issues of fact exist to be resolved at trial. *See Sayers*, 7 F.3d at 1094. Summary judgment is proper when the "words and actions that allegedly formed a contract [are] so clear themselves that reasonable people could not differ over their meaning." *Bourque* v. *FDIC*, 42 F.3d 704, 708 (1st Cir. 1994) (citation and internal quotation marks omitted); *Sayers*, 7 F.3d at 1094; *Brown Bros. Elec. Contractors* v. *Beam Construction Corp.*, 41 N.Y.2d 397, 399, 393 N.Y.S.2d 350, 351-52, 361 N.E.2d 999, 1001 (1977) (citations omitted).

Under New York law, an acceptance "must comply with the terms of the offer and be clear, unambiguous and unequivocal." *King* v. *King*, 208 A.D.2d 1143, 1144, 617 N.Y.S.2d 593, 594 (N.Y. App. Div. 1994) (citations omitted). "A proposal to accept the offer if modified or an acceptance subject to other terms and conditions [is] equivalent to an absolute rejection of the offer." *See Poel* v. *Brunswick-Balke-Collender Co.*, 216 N.Y.310, 319, 110 N.E. 619, 622 (1915). However, "[i]f the acceptance of an offer is initially unconditional, the fact that it is accompanied with a direction or a request looking to the carrying out of its provisions, but which does not limit or restrict the contract, does not render it ineffectual or give it the character of a counteroffer." *Valashinas* v. *Koniuto*, 283 A.D. 13, 17, 125 N.Y.S.2d 554, 558 (N.Y. App. Div. 1953), *aff'd*, 308 N.Y. 233, 239, 124 N.E.2d 300, 302 (1954) (A "suggestion, request or overture"

in an acceptance are not conditions); *see Matter of McManus*, 83 A.D.2d 553, 558, 440 N.Y.S.2d 954, 957 (N.Y. App. Div. 1981) ("An exact and unconditional acceptance of an offer is not afterward turned into a conditional acceptance or counteroffer so as to prevent the formation of a contract, by an improper interpretation of the terms of the agreement by one of the parties." (citations omitted)), *aff'd*, 55 N.Y.2d 855, 447 N.Y.S.2d 708, 432 N.E.2d 601 (1982).

We conclude as a matter of law that Krumme unconditionally accepted WestPoint's offer. Krumme executed the EPI Amendment without modification. Furthermore, even assuming that Krumme's cover letter can be read as expressing an additional term that the 5% discount rate was not subject to change, nothing in Krumme's cover letter suggests that he conditioned his acceptance on this request or "understanding" of his agreement with WestPoint. We therefore affirm the district court's grant of summary judgment in favor of Krumme.

2. *Change to the Discount Rate*

WestPoint argues that the district court erred in concluding that the Cluett Committee had no authority under ERISA to amend the discount rate and that the discount rate incorporated into the EPI Amendment remained 5% at all relevant times. *See Allen II*, 908 F.Supp. at 1222. WestPoint contends that the Cluett Committee, acting under section 1.3's express authority to adopt new actuarial assumptions "from time to time," did not amend the Cluett Plan and therefore a formal Cluett Board amendment was not required under ERISA. According to WestPoint, the Cluett Committee properly sought and implemented the recommendation of TPF&C, its actuary, and formally recorded the adoption of the 9.3% rate in the Cluett Committee's minutes. Because the Cluett Committee minutes constitute binding Cluett Plan documents,

WestPoint contends that the EPI Amendment incorporated the 9.3% discount rate memorialized in the Cluett Committee minutes. We agree.[17]

Under ERISA, an employee benefit plan is required to be "established and maintained pursuant to a written instrument," 29 U.S.C. § 1102(a)(1), and to "specify the basis on which payments are made . . . from the plan." *Id.* at (b)(4); *see Rinard* v. *Eastern Co.*, 978 F.2d 265, 268 n.2 (6th Cir. 1992) (concluding that the pension plan need not be contained in a single written document), *cert. denied*, 507 U.S. 1029 (1993); *Board of Trustees* v. *Weinstein*, 107 F.3d 139, 142-43 (2d Cir. 1997) (defining "instrument" in section 1102(a)(1) as a "formal governing document" that "sets out rights, duties, obligations"). Furthermore, under 29 U.S.C. § 1102(b)(3), a plan must "provide a procedure for amending [the] plan, and for identifying the persons who have authority to amend the plan." *See Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 79 (1995) (when a plan reserves amendment power in a specific corporate body, "one must look *only* to [that corporate body] and *not* to any other per-

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[17] We reject WestPoint's arguments that (1) because the *Allen* plaintiffs pleaded no ERISA law claim in the complaint, they are barred from pursuing a claim or remedy under ERISA; and (2) that because benefits due under a "top hat" plan (the EPI Program) are at issue, ERISA law is irrelevant to determine the Cluett Committee's authority to adopt actuarial factors. We adopt the district court's reasoning. *See Allen II*, 908 F.Supp. at 1221 (concluding, respectively, that (1) "[p]laintiffs do not pursue a claim or remedy under ERISA, but simply argue that ERISA's requirements are relevant to interpreting the terms of the [Cluett Plan] and EPI Amendment," and (2) that ERISA "*indirectly* affect[s] the EPI Amendment because [it] govern[s] the terms of the [Cluett Plan]").

We also reject WestPoint's argument that, in light of the Cluett Committee's broad powers to interpret the Cluett Plan under section 9.6, the Cluett Committee's action is to be accorded deference. *See Algie* v. *RCA Global Communications*, 60 F.3d 956, 960 (2d Cir. 1995) (affirming district court's conclusion that deference was not due to plan administrator on issue of whether severance plan was validly terminated under 29 U.S.C. § 1102(b)(3)).

son" as the entity that may exercise amendment power); *e.g.*, *Coleman* v. *Nationwide Life Ins. Co.*, 969 F.2d 54, 58-59 (4th Cir. 1992) ("[A]ny modification to a plan must be implemented in conformity with the formal amendment procedures."), *cert. denied*, 506 U.S. 1081 (1993); *Alday* v. *Container Corp. of America*, 906 F.2d 660, 665 (11th Cir. 1990) (same).

In considering whether, under ERISA, the Cluett Committee's authority to adopt new actuarial assumptions unlawfully conflicted with the Cluett Board's exclusive authority to amend the Cluett Plan, we are guided by a Seventh Circuit decision rendered on facts essentially indistinguishable from ours. *See Dooley* v. *American Airlines*, 797 F.2d 1447 (7th Cir. 1986), *cert. denied*, 479 U.S. 1032 (1987). In *Dooley*, the plaintiffs were American Airlines' employees who elected to receive their retirement benefits in a lump sum amount that would be the actuarial equivalent of a future stream of periodic retirement payments. Their retirement plan defined "actuarial equivalent" as "the equivalent in value on the basis of actuarial factors *approved from time to time by American Airlines*." *Id.* at 1451. American Airlines, pursuant to offering the lump sum option to plaintiffs, also had issued a bulletin stating that the discount rate was 8-1/2%. *Id.* at 1449. At issue in *Dooley*, as here, was American Airlines' subsequent decision to switch from a fixed 8-1/2% discount rate to a floating rate that effectively increased the discount rate by several percentage points. The plaintiffs objected to this switch, arguing that the change to the floating rate constituted an "amendment" that resulted in the reduction of accrued benefits in violation of 29 U.S.C. § 1054(g) ("The accrued benefit of a participant under a plan may not be decreased by an *amendment* of the plan." (emphasis added)).

The court, considering the merits of the plaintiffs' argument did not reach the issue of whether the actuarial assumptions were part of the pension plan, but held that, in any event, a change to the discount rate was not an "amendment;" American Airlines simply had acted pursuant to its authority to change actuarial assumptions from "time to time." *Id.* at 1451; *see id.* at 1452 ("[W]e are unwilling to contort the plain meaning of 'amendment' so that it includes the valid exercise of a provision which [is] already firmly ensconced in the pension document."); *accord Oster* v. *Barco of California Employees' Retirement Plan*, 869 F.2d 1215, 1219 (9th Cir. 1988); *Stewart* v. *National Shopmen Pension Fund*, 730 F.2d 1552, 1561 (D.C. Cir. 1984) (there is no "amendment" when a "provision already incorporated into the plan [is] *applied* [and] [a]ctions authorized by the plan [a]re carried out by the persons authorized to do so"); *Holian* v. *Leavitt Tube Co.*, 1989 WL 44570, at *4 (N.D. Ill. Apr. 28, 1989) (where plan provision authorized plan committee to add "valuation dates," the addition of such dates was not an amendment within the exclusive purview of the plan's board of directors because plan committee applied provision already incorporated into the plan); *Whitaker* v. *Texaco*, 729 F.Supp. 845, 851 (N.D. Ga. 1989) ("[I]f the *provision itself* gives the fiduciary discretion, then exercising that discretion is obviously not an amendment of a provision, it is simply the exercise of a provision.").

We disagree with the *Allen* plaintiff's argument that, in light of Revenue Ruling 79-90, *Dooley* is bad law. Rather, the court purposefully fashioned a "commonsensical rule of law" that applied regardless of this Ruling. Further, we follow *Dooley*'s "commonsensical rule of law" and conclude that the Cluett Committee, under Cluett Plan § 1.3, adopted a 9.3% discount rate under ERISA without amending the Cluett Plan's terms. *Dooley*, 797 F.2d at 1452. As in *Dooley*, the

Cluett Committee acted under its express authority to adopt new actuarial assumptions "from time to time" on the recommendation of its actuary, TPF&C. *See* Cluett Plan § 1.3. Therefore, notwithstanding the absence of a Cluett Board amendment, the Cluett Committee validly adopted the 9.3% discount rate.[18] Moreover, in accordance with 29 U.S.C. § 1102(a)(1) and (b)(4), the Cluett Committee memorialized the adoption of the 9.3% discount rate in a written instrument, that is, the Cluett Committee minutes. Terms contained in the Committee's minutes are "*conclusive and binding* upon the Company, Participants, and all other persons having any interest under the Plan." *See* Cluett Plan § 9.6; *Weinstein*, 107 F.3d at 142-45 (concluding that documents that set forth terms that are binding on plan administrators are "instruments under which a plan is established or operated." (quoting 29 U.S.C. § 1024(b)(4)). Accordingly, the EPI Amendment, pursuant to § 4A.1(c), incorporated this 9.3% discount rate when it was memorialized in the Cluett Committee minutes. *See* EPI Amendment § 4A.1(c) (incorporating actuarial assumptions "contained in" the "Cluett Employee Retirement Plan").

We address and quickly dispose of Krumme's and the *Allen* plaintiffs' remaining arguments. First, Revenue Ruling 79-90 expresses no requirement that new actuarial assumptions be adopted exclusively pursuant to a plan's formal amendment procedures. *See* Rev. Rul. 79-90, 1979 – 1 C.B. 155 (codified at 26 U.S.C. § 401(a)(25)). Rather, the Revenue Ruling simply requires employers to specify their actuarial assumptions in the plan and eliminates their discretion to choose actuar-

[18] The holdings in *Alday* and *Coleman* are not to the contrary. Those cases do not stand for the proposition that *any* change to the terms of a pension plan is valid only if effected pursuant to a plan's amendment procedures. In neither of those cases did the courts consider whether a specified plan term could be validly modified pursuant to an express plan provision that authorized changes by a process other than plan amendment.

ial factors *ad hoc*.[19] Furthermore, because we conclude that the Cluett Committee did not *amend* the Cluett Plan, 29 U.S.C. § 1054(g) does not require the use of a blended discount rate. *See* 29 U.S.C. § 1054(g) (prohibiting the reduction of accrued benefits by "amendment"); *Dooley*, 797 F.2d at 1452. We also conclude that the plaintiffs' argument that WestPoint be bound to a series of judicial admissions made in the district court proceedings is baseless; plaintiffs seek an advantage by quoting WestPoint out of context.

Finally, to support their argument that the discount rate was never changed and remained 5% at all relevant times, the plaintiffs contend that (1) on April 24, 1989, Ms. Virginia Mansfield received a lump sum payout under the Cluett Plan calculated at a 5% rate; (2) Bidermann's actuary, The Wyatt Company, employed a 5% rate to calculate benefits due to former Cluett employees under the Cluett Plan; and (3) although Cluett Plan participants, under 29 U.S.C. § 1024(b)(1), were entitled to receive notice of a material modification to the Cluett Plan, they never were notified of the new 9.3% rate, *see* 29 U.S.C. § 1024(b)(1). Even accepting the truth of these allegations, however, they do not support the plaintiffs' argument. We already have concluded as a matter of law that the Cluett Committee, on February 16, 1989, validly adopted the 9.3% discount rate. Any subsequent payments using an erroneous rate would not change that conclusion.

3. *Attorney's Fees*

WestPoint urges us to review the district court's award of attorney's fees and costs to the plaintiffs although the amount

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[19] Plaintiffs offer the legal opinions of two actuaries, Steven Harrold and F. Thomas Senior, as support for its argument that Revenue Ruling 79-90 requires actuarial assumptions to be adopted pursuant to a plan's amendment procedures. We find these opinions unpersuasive.

of those fees and costs have not yet been set. WestPoint argues that by doing so, we may conserve scarce judicial resources. The plaintiffs' attorneys in both *Allen* and *Krumme* have accumulated immense fees and costs over the lengthy course of these lawsuits and disputes are certain to arise as to the proper amount of fees and costs to which they are entitled. According to WestPoint, if we were to determine expeditiously that the district court's award of fees and costs to plaintiffs was error, we would prevent the needless expenditure of judicial resources. WestPoint contends that we have jurisdiction pursuant to 28 U.S.C. § 1291 or, alternatively, under the doctrine of pendent appellate jurisdiction.

Under section 1291, we review final decisions of the district court that "leave[ ] nothing for the court to do but execute the judgment." *Catlin* v. *United States*, 324 U.S. 229, 233 (1945). Where attorney's fees and costs have been awarded, but not determined, the order is not final. *See Discon, Inc.* v. *NYNEX Corp.*, 4 F.3d 130, 133 (2d Cir. 1993) ("[A] sanction order that leaves the amount of the sanction for later determination is not final and, therefore, not appealable under § 1291."); *see Pridgen* v. *Andresen*, 113 F.3d 391, 394 (2d Cir. 1997) ("[R]ules of finality for sanction orders parallel the rules for attorney fee awards." (citation and internal quotation marks omitted)); *F.H. Krear & Co.* v. *Nineteen Named Trustees*, 776 F.2d 1563, 1564 (2d Cir. 1985) (per curiam) ("We have held that where attorneys' fees are a contractually stipulated element of damages, a judgment is not final until the fees have been determined.").

Under the doctrine of pendent appellate jurisdiction, however, "once we have taken jurisdiction over one issue in a case, we may, in our discretion, consider otherwise nonappealable issues in the case as well, where there is sufficient overlap in the factors relevant to the appealable and nonappealable issues to warrant our exercising plenary authority

over the appeal." *San Filippo* v. *U.S. Trust Co. of New York*, 737 F.2d 246, 255 (2d Cir. 1984), *cert. denied*, 407 U.S. 1035 (1985); *see Synergy Gas Co.* v. *Sasso*, 853 F.2d 59, 62 (2d Cir.), *cert. denied*, 488 U.S. 994 (1988); *Pridgen*, 113 F.3d at 394 (in *Synergy*, the adjudication "was at most an exercise of pendent appellate jurisdiction" (citation and internal quotation marks omitted)). We have, however, rejected the doctrine of pendent appellate jurisdiction as a basis to review an undetermined award of attorney's fees, even when the question of liability for the fees had been consolidated with other decisions that were final. *See Cooper* v. *Salomon Bros.*, 1 F.3d 82, 85 (2d Cir. 1993) (the policy of promoting " 'orderly judicial administration' " cannot "justify broadening the jurisdiction of a federal court without congressional approval"), *cert. denied*, 510 U.S. 1063 (1994); *accord Pridgen*, 113 F.3d at 394.

Although we are cognizant of the serious practical considerations supporting WestPoint's argument, we adhere to our prior holdings that we have no jurisdiction, under 28 U.S.C. § 1291, to review a grant of attorney's fees and costs until the amount of fees and costs have been set. *See Pridgen*, 113 F.3d at 394 (holding that orders awarding attorney's fees are not appealable until those fees have been set). We reject WestPoint's argument that under the rule established in *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196 (1988), we have jurisdiction over the attorney's fees issue. In *Budinich*, the Court held that a decision on the merits is final under section 1291 even if the recoverability and amount of attorney's fees for litigation remains to be determined. *Id.* at 202-03. In other words, the merits of a decision could be separated from attorney's fees issues for the purpose of appeal. The Court did not decide whether the issues of recoverability and amount of attorney's fees ~~can be similarly separated~~. Although in *Synergy*, we arguably exercised pendent appel-

late jurisdiction to review an undetermined award of attorney's fees, we have since questioned that decision as the availability of appellate jurisdiction had not been raised in that case. *See id.* In light of our more recent and unequivocal conclusion in *Cooper*, we decline to exercise pendent appellate jurisdiction.

4. *Denial of Leave to Amend*

WestPoint appeals from the district court's denial of WestPoint's motion for leave to amend its answer in *Krumme*. WestPoint, pursuant to Fed. R. Civ. P. 15(a), moved to amend its answer to assert counterclaims against Krumme for, among other things, legal malpractice and breach of contract on the grounds that Krumme had solicited clients adverse to WestPoint on matters substantially related to Krumme's work for Cluett.[20] The district court denied Krumme's motion for leave to amend its answer, concluding that:

> Contrary to Defendant's assertion, the proposed amendments are based on facts known to Defendant since 1989. Defendant has offered no adequate excuse for its delay in seeking to amend its answer. Moreover, it is readily apparent that the proposed amendments would require a new wave of discovery and would substantially delay the resolution of this action.

Krumme, 1996 WL 257633, at *1 (S.D.N.Y. May 15, 1996). WestPoint argues that its new counterclaims would not have required extensive discovery and that its mere delay in moving to amend did not provide a sufficient basis for the district court's denial.

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[20] In light of our conclusion that the Cluett Committee had authority under ERISA to adopt new actuarial assumptions, we need not consider WestPoint's motion for leave to amend with respect to its proposed estoppel defense and counterclaims for rescission and reformation of the EPI Amendment.

A decision to grant or deny a motion to amend is within the sound discretion of the trial court. *See Foman* v. *Davis*, 371 U.S. 178, 182 (1962); *John Hancock Mut. Life Ins. Co.* v. *Amerford Int'l Corp.*, 22 F.3d 458, 462 (2d Cir. 1994). It will not be overturned on appeal absent an abuse of discretion. *See Ruffolo* v. *Oppenheimer & Co.*, 987 F.2d 129, 131 (2d Cir. 1993). We have stated that "considerations of undue delay, bad faith, and prejudice to the opposing party [are] touchstones of a district court's discretionary authority to deny leave to amend." *Barrows* v. *Forest Laboratories*, 742 F.2d 54, 58 (2d Cir. 1984) (footnote omitted); *see Zahra* v. *Town of Southold*, 48 F.3d 674, 686 (2d Cir. 1995) (affirming denial of leave to amend after request filed two and one-half years after the commencement of action and three months prior to trial). "One of the most important considerations in determining whether amendment would be prejudicial is the degree to which it would delay the final disposition of the action." *H.L. Hayden Co.* v. *Siemens Medical Systems*, 112 F.R.D. 417, 419 (S.D.N.Y. 1986) (collecting cases). Furthermore, "[a] proposed amendment . . . [is] especially prejudicial . . . [when] discovery had already been completed and [non-movant] had already filed a motion for summary judgment." *Ansam Associates* v. *Cola Petroleum, Ltd.*, 760 F.2d 442, 446 (2d Cir. 1985) (internal quotation marks and citation omitted)).

Without considering the merits of WestPoint's proposed counterclaims, we affirm the district court's order denying the motion to amend. WestPoint knew of Krumme's retainer agreement with the *Allen* plaintiffs since March 1993. As Krumme's case was near resolution and discovery had been completed, the district court acted well within its discretion in concluding that WestPoint's new counterclaims would prejudice Krumme.

Appendix A

CONCLUSION

In *Allen*, we affirm the district court's judgment in favor of defendants WestPoint, Dorsett and Roark. Because we conclude that the 9.3% PBGC-based rate was the proper rate at which to calculate the *Allen* plaintiffs' lump sums, we need not review the district court's decision with respect to the *Allen* plaintiffs' rescission and misrepresentation claims.

In *Krumme*, we affirm the district court's grant of summary judgment to Krumme on the issue of contract formation between Krumme and WestPoint and the district court's denial of WestPoint's motion for leave to amend. With respect to Krumme's breach of contract claim, we conclude that WestPoint is entitled to summary judgment to the extent that it argues that the 9.3% PBGC-based rate was the proper rate at which to compute the lump sum payments for EPI Amendment participants on April 5, 1989. We vacate the district court's judgment on the merits in *Krumme* and remand for further proceedings consistent with this opinion.

In both *Allen* and *Krumme*, we conclude that we have no jurisdiction to review the district court's award of attorney's fees and costs until the amount of those fees and costs have been set. We remand for the calculation of the plaintiffs' attorney's fees and costs in *Allen* and *Krumme*.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED MAY 1, 1998

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 1st day of May, one thousand nine hundred and ninety-eight.

PRESENT: HON. Ralph K. Winter
Chief Judge
HON. THOMAS J. MESKILL
Circuit Judges
HON. John S. Martin, Jr.
District Judge*

Docket Nos: 97-7312, 97-7384

ROBERT D. KRUMME,

Plaintiff-Appellee,

GORDON E. ALLEN; JOHN CURRIER; NICHOLAS PALLOTTA; JAMES J. DUNNE; LEO FORNERO; GERARD

* The Honorable John S. Martin, Jr., United States District Judge for the Southern District of New York, sitting by designation.

Appendix B

P. MANDRY; NORMAN K. MATHESON; COCHRAN P. SUPPLEE and BRUCE E. MOORE,

Plaintiffs-Appellees-Cross-Appellants,

-v-

WESTPOINT STEVENS INC., formerly known as WEST POINT-PEPPERELL, INC.,

Defendant-Appellant-Cross-Appellee,

C. POWERS DORSETT and D. MICHAEL ROARK,

Defendants-Cross-Appellees.

Appeals from United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby **ORDERED, ADJUDGED, and DECREED** that the judgments of said district court be and they hereby are affirmed in part, vacated in part, and remanded to the said district court for further proceedings in accordance with the opinion of this court.

For the Court

GEORGE LANGE III, Clerk
By: s/ Arthur M. Heller
Arthur M. Heller
Administrative Attorney

APPENDIX C — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MAY 15, 1996

Robert D. KRUMME,

Plaintiff,

v.

WEST POINT-PEPPERELL, INC.,

Defendant.

No. 89CIV.2016(SAS).

United States District Court, S.D. New York.

May 15, 1996.

MEMORANDUM OPINION

SCHEINDLIN, District Judge.

In an Opinion and Order dated November 2, 1995 in the related action of Allen v. West Point-Pepperell, Inc., I granted summary judgment to Plaintiffs on a number of issues. See Allen v. West Point-Pepperell, Inc., 908 F. Supp. 1209 (S.D.N.Y. 1995).[1] Robert Krumme, the Plaintiff in this action,

1. Specifically, I held that the efforts to amend the Cluett Pension Plan were ineffective under ERISA; that for purposes of the amendment to the Executive Permanent Insurance Program ("EPI Amendment"), the Cluett Pension Plan "contained" a 5% discount rate; and that the Allen Plaintiffs were "entitled to interest of 2% over the Chemical Bank prime rate on any award they obtain for underpayment of their deferred compensation benefits under the EPI Amendment." Allen, 908 F. Supp. at 1225.

now moves for partial summary judgment, contending that the findings made in the Allen case should be applied to his suit. Defendant cross-moves for leave to amend its answer. For the reasons set forth below, Plaintiff's motion for partial summary judgment is granted and Defendant's motion for leave to amend is denied.[2]

I. Collateral Estoppel

The doctrine of collateral estoppel promotes judicial economy by prohibiting the relitigation of issues previously litigated in, and necessary to the outcome of, a prior action. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.5 (1979). Collateral estoppel will only apply where: (1) the issues in both proceedings are identical; (2) the issue in the prior proceeding has been litigated and decided; (3) there was a full and fair opportunity for litigation in the prior proceeding; and (4) the previously litigated issue was necessary to support a valid and final judgment on the merits. See Gelb v. Royal Globe Ins. Co., 798 F.2d 38, 44 (2d Cir.), cert. denied, 480 U.S. 948 (1987).

All of the elements necessary for collateral estoppel are present here. In opposition to Plaintiff's motion, Defendant offers the same arguments it made in support of its motion for reargument in the Allen case. I have already rejected these arguments. The doctrine of collateral estoppel permits me to rely on the previous determination. Accordingly, Plaintiff's motion for partial summary judgment is granted.

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2. Familiarity with the underlying facts of this case is assumed.

Appendix C

II. Motion to Amend

Defendant moves to amend its answer to include an estoppel defense and counterclaims for rescission, reformation, legal malpractice and breach of contract. Defendant's motion is denied.

This dispute has dragged through the courts for seven years, consuming an entirely disproportionate amount of judicial time and energy. The number of opinions generated in the Allen, Krumme and Barefoot cases is a testament to this disturbing fact and is only the tip of the iceberg. See Allen v. WestPoint-Pepperell, Inc., 945 F.2d 40 (2d Cir. 1991); Allen v. WestPoint- Pepperell, Inc., 1996 WL 2004 (S.D.N.Y. Jan. 3, 1996); Allen v. West Point- Pepperell, Inc., 908 F. Supp. 1209 (S.D.N.Y. 1995); Allen v. West Point- Pepperell, Inc., 848 F. Supp. 423 (S.D.N.Y. 1994); Allen v. WestPoint- Pepperell, Inc., 1991 WL 8505 (S.D.N.Y. Jan. 25, 1991); Krumme v. West Point-Pepperell, Inc., Order of April 19, 1990 (S.D.N.Y.); Barefoot v. West Point-Pepperell, Inc., 635 N.Y.S.2d 226 (1st Dep't 1995); Barefoot v. West Point-Pepperell, Inc., Order of September 28, 1994 (N.Y. Co. Sup. Ct.).

Contrary to Defendant's assertion, the proposed amendments are based on facts known to Defendant since 1989. Defendant has offered no adequate excuse for its delay in seeking to amend its answer. Moreover, it is readily apparent that the proposed amendments would require a new wave of discovery and would substantially delay the resolution of this action. Defendant's motion to amend is therefore denied. See H.L. Hayden Co. of New York v. Siemens Medical Systems, Inc., 112 F.R.D. 417, 419 (S.D.N.Y. 1986) (leave to amend denied because action had reached the eve of resolution, and

defendants would be unduly prejudiced if exposed to additional discovery).

III. Conclusion

For the foregoing reasons, Plaintiff's motion for partial summary judgment is granted, and Defendant's cross-motion to amend its answer is denied.

SO ORDERED:

Dated: New York, New York May 13, 1996

APPENDIX D — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, DATED NOVEMBER 2, 1995

Gordon E. ALLEN, John Currier, James J. Dunne, Leo Fornero, Gerard P. Mandry, Norman K. Matheson, Bruce E. Moore, Nicholas Pallotta and Cochran B. Supplee, Plaintiffs,

v.

WEST POINT-PEPPERELL, INC., D. Michael Roark, C. Powers Dorsett, and Barry F. Shea, Defendants.

No. 90 Civ. 3841 (SAS).

United States District Court,
S.D. New York.

Nov. 2, 1995.

* * *

OPINION AND ORDER

SCHEINDLIN, District Judge.

Nine former executives of Cluett Peabody & Co. ("Cluett") bring this diversity action against West Point-Pepperell, Inc. ("West Point"), of which Cluett was once a subsidiary and division. Plaintiffs contend that West Point, in the face of a hostile takeover attempt, reduced the lump sum payments of deferred compensation due Plaintiffs under an employee benefit plan by wrongfully changing the discount rate applicable to those payments. Plaintiffs seek damages for breach of contract and fiduciary duty for West Point's failure to pay Plaintiffs

their full deferred compensation benefits. Plaintiffs also state claims in connection with releases they executed in conjunction with their lump sum payments. They seek both damages, alleging that the releases were fraudulently induced, and rescission, alleging that the releases were the product of unilateral or mutual mistake. By Opinion and Order dated August 2, 1995 ("August 2 Opinion"), this Court granted in part and denied in part the parties' cross-motions for partial summary judgment on Plaintiffs' breach of contract and rescission claims.

PLAINTIFFS' MOTION FOR REARGUMENT

Plaintiffs presently move, pursuant to Rule 3(j) of the Civil Rules of this Court, for leave to reargue the portion of the August 2 Opinion which denied them summary judgment with respect to the discount rate applicable to their lump sum payments. Plaintiffs' motion for reargument asserts, *inter alia*, that the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), governs the Court's interpretation of the contract terms at issue in this case. The Court did not address this possibility in its August 2, 1995 Opinion.[1] Upon reconsideration of the summary judgment motions, the Court finds that Plaintiffs are entitled to partial summary judgment on their contract claims. Accordingly, Plaintiffs' motion for reargument is granted. *See Park South Tenants Corp. v. 200 Central Park South Assocs., L.P.*, 754 F.Supp. 352, 354 (S.D.N.Y.) (motion for reargument may be granted where court has overlooked matters which might have materially influenced earlier decision), *aff'd*, 941 F.2d 112 (2d Cir.1991).

1. Although Plaintiffs mentioned the relevance of ERISA during oral argument and in correspondence to the Court, they relied largely on other grounds in making their motion and did not brief the ERISA issue in their summary judgment memoranda.

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Because the Court: (1) must partially reverse the outcome of the August 2 Opinion; (2) finds, upon reconsideration of the motions in light of all relevant authority now brought to its attention, that portions of its prior analysis were erroneous; and (3) decided issues in the August 2 Opinion which no longer need be decided,[2] the Court hereby withdraws the August 2 Opinion. For the reasons stated in this Opinion and Order, Defendants' motion for partial summary judgment is denied, and Plaintiffs' motion for partial summary judgment is denied in part and granted in part.

PARTIES' CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT

BACKGROUND

The parties' submissions establish the following undisputed facts. *See generally* Statements Pursuant to Local Rule 3(g) ("3(g) Statements"). The Court has included specific citations to the record only in the few instances in which the parties' submissions raise issues of fact.

A. *Parties*

The Plaintiffs are former executives of Cluett, a company which West Point acquired in 1986. West Point is a Georgia corporation which conducts business in textile, apparel and bed and bath products. Cluett was merged into West Point in January

2. The prior decision addressed (1) the Cluett Pension Committee's contractual authority to change the Cluett Pension Plan's discount rate and (2) the existence of a possible ambiguity in the Executive Permanent Insurance Program Amendment. The Court need not reach either of these issues under the analysis set forth in this Opinion.

1989 and operated as a division thereof until March 1990, when West Point sold Cluett to Bidermann Industries, Inc.

Defendant D. Michael Roark was Vice President of Human Resources for Cluett at all relevant times until 1986, and then Vice President of Human Resources for West Point until May 1989. At all relevant times, Defendant C. Powers Dorsett was West Point's Vice President, Secretary and General Counsel, and a member of the Cluett Retirement Plan Committee. He also served as a member of the Board of Directors of Cluett from January 1986 to December 1988. At all relevant times, Defendant Barry F. Shea was Assistant Treasurer and then Treasurer of West Point and a member of the Cluett Retirement Plan Committee.

B. *Factual Background*

1. *EPI Program*

In 1975, Cluett established for its senior executives an employee benefit program known as the Executive Permanent Insurance Program ("EPI Program"). The EPI Program consists of certain retirement and life and health insurance benefits, including a deferred compensation agreement which provides supplemental pension benefits. The Plaintiffs are participants in the EPI Program and are parties to a deferred compensation agreement under that program.[3]

3. The deferred compensation agreement requires Cluett to pay each participant, upon reaching age 65, monthly payments for the rest of his life equal, on an annual basis, to 30% of his highest annual salary. The agreement also requires Cluett to pay, upon each participant's death, monthly payments to the participant's spouse for the rest of her life equal, on an annual basis, to 15% of the participant's highest annual salary. This type of benefit is commonly referred to as a "joint and survivor benefit."

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2. *EPI Program Amendment*

At its meeting of January 27, 1987, the Board of Directors of West Point ("West Point Board") decided to amend West Point's employee benefit plans (including the plans of its wholly-owned subsidiaries such as Cluett) to protect employee benefits in the event of a change in control of West Point. Thereafter, West Point sent the Plaintiffs an amendment, dated November 11, 1988, to the EPI Program ("EPI Amendment"). The Plaintiffs each executed the EPI Amendment, which provides that upon a "Change in Control" of West Point, each Plaintiff will receive the "Actuarial Equivalent" of his deferred compensation benefits in a single lump sum. The EPI Amendment defines "Actuarial Equivalent" in the following manner:

> The term "Actuarial Equivalent" means, with respect to . . . Deferred Compensation . . . [a] benefit provided under the terms of this Agreement which has the same present value as the Accrued Benefit. For the purpose of establishing whether a benefit is the Actuarial Equivalent of another benefit the actuarial assumptions contained in Cluett's Employee Retirement Plan shall be employed for so long as that Plan remains in existence and if such Plan is no longer in existence, the actuarial assumptions last used by such Plan shall be used.

Affidavit of Robert J. Hausen, attorney for Plaintiffs ("Hausen Aff."), Ex. E. ¶ 4A(1)(c) (EPI Amendment).

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3. *The Cluett Pension Plan*

The parties agree that the Cluett Employee Retirement Plan ("Cluett Pension Plan," "Plan") was a defined benefit plan duly qualified under ERISA. The Plan document sets forth the following with respect to actuarial assumptions:

> "Actuarial Equivalent" means an amount of equal value when computed on the basis of interest, mortality and other tables as shall be adopted from time to time by the Committee on the advice of the Actuary, the current factors being as specified below:
>
> 1. Mortality Table. The 1978 GAM table (which is the 1971 Group Annuity Mortality Table projected to 1978 with Scale E). An average of male and female rates will be used.
>
> 2. Interest Rate. 5% per annum compounded annually.
>
> 3. Other Factors. None.

Hausen Aff.Ex. F § 1.3 (Cluett Pension Plan). Cluett amended the Pension Plan in 1983 to include this statement of the current applicable factors. Prior to 1983, Section 1.3 of the Plan consisted of the above-quoted language, absent the portion commencing, "the current factors being as specified below."

The Cluett Pension Plan gives the Cluett Committee the authority to "adopt" or "determine" the actuarial assumptions applicable to the Plan:

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> [I]nterest, mortality and other tables . . . shall be adopted from time to time by the Committee on the advice of the Actuary . . .
>
> [The] decisions and the records of the Committee shall be conclusive and binding upon the Company, Participants, and all other persons having any interest under the Plan. The Committee . . . shall determine from time to time the percentum rate or rates of interest to be used as the basis for calculations required in connection with the [Cluett Pension] Plan. As an aid to the Committee, the Actuary appointed by the Committee shall make annual actuarial valuations of the assets and liabilities of the [Cluett Pension] Plan and shall certify to the Committee the tables and rate or rates of interest which he would recommend for use by the Committee.

Id. §§ 1.3, 9.6.

The Cluett Pension Plan confers the right to "amend" the Plan to the Cluett Board of Directors ("Cluett Board"):

> The Board of Directors reserves the right at any time, and from time to time, to modify or amend in whole or in part any or all of the provisions of the [Cluett Pension] Plan, but no such amendment shall substantially change the rights to benefits which, prior to such amendment, have become fixed or matured by retirement, termination or death. . . .

Id. § 11.1. The Plan also provides that the Cluett Board's amendment authority is exclusive: "The Company acting through the Board of Directors shall have the sole authority to . . . amend or terminate, in whole or in part, the Plan. . . ." Pls.' Comp. of Non-Case Auths. Cited in Pls.' Mem. in Supp. of Mot. to Rearg. ("Pls.' Supp.Authorities") Ex. D § 9.1 (Cluett Pension Plan).[4]

4. *Change in Cluett Pension Plan Discount Rate*

In October 1988, a wholly-owned subsidiary of Farley Inc. ("Farley") commenced a tender offer for all of the shares of West Point. By no later than February 1989, Defendants decided to change the actuarial assumptions contained in the Cluett Pension Plan in order to change the discount rate used to calculate lump sums under the EPI Amendment. On or before February 16, 1989, Defendant Roark or Shea solicited from West Point's actuary, TPF & C, its opinion of the assumptions used in the Cluett Pension Plan. TPF & C recommended that West Point replace the Cluett Pension Plan's 5% discount rate with the rate used in West Point's pension plan. The West Point rate — calculated at 120% of the Pension Benefits Guaranty Corporation ("PBGC") immediate interest rate — was 9.3% during February and March 1989.

On February 16, 1989, the Cluett Pension Plan Committee (Cluett Committee) followed TPF & C's recommendations and decided to adopt the PBGC-based discount rate (then 9.3%)

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4. Although Plaintiffs' counsel mentioned this section during oral argument, Plaintiffs neither relied on the section in their summary judgment memoranda nor provided a copy of it to the Court in their summary judgment submissions.

for the Cluett Pension Plan ("February 16, 1989 Committee Action").[5] The February 16, 1989 Committee Action is recorded in the Committee's minutes. The Cluett Committee acted with the intention of affecting the amount payable to participants in the EPI Program.

At all times relevant to this action, the interest rate printed in section 1.3 of the Cluett Pension Plan document was 5%. Neither the West Point Board nor the Cluett Board[6] ever voted to amend the actuarial assumptions used by the Cluett Pension Plan. Henry H. Henley, a West Point Board member, testified that an individual (whose identity Henley cannot recall) informed the West Point Board on February 23, 1989 that the Cluett Committee either had changed or was going to change the Cluett Pension Plan's actuarial assumptions. Defs.' 3(g) Statement Ex. 55 at 141-46 (Henry H. Henley Dep. Tr.). Henley did not object to the change and does not recollect any protest by other Board members. *Id.* at 145.

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5. Shea, Dorsett and others met on February 16, 1989 as West Point's Management Pension Committee. The West Point Management Pension Committee had, in 1988, been appointed by the Cluett Board of Directors to act as the Cluett Committee. *See* Declaration of Defendant C. Powers Dorsett ¶ 3; Defs.' 3(g) Statement Ex. 23 (Jan. 4, 1988 Action of Cluett Board of Directors); *Id.* Ex. 22 ¶ 9.2 (Cluett Pension Plan) (authorizing Cluett Board of Directors to appoint members of Cluett Committee). Thus, Shea, Dorsett and the others acted as the Cluett Committee when they adopted the PBGC-based discount rate for the Cluett Pension Plan.

6. The Cluett Board ceased to exist when Cluett merged into West Point in January 1989.

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5. *Plaintiffs' Releases and Payout of Lump Sum Benefits*

By letter dated February 22, 1989, Defendant Roark informed the Plaintiffs that their lump sum EPI Program benefits would be calculated using the 9.3% PBGC-based discount rate:

There has apparently been some confusion as to the method of calculation to be employed in determining the lump sum benefit under the Cluett Deferred Compensation Agreements. Some participants have told us that they were led to believe that a 5% discount rate would be used to determine lump sum values. This is incorrect. The formula under the Cluett Employee Retirement Plan which is referenced in the November 11, 1988, amendment calls for converting monthly annuities to lump sum amounts as follows:

> "120% of the Pension Benefits Guaranty Corporation ("PBGC") immediate interest rate, unless the lump sum amount is less than $25,000. If the lump sum amount is less than $25,000 using the above rate, the lump sum is to be recalculated *1215 using the PBGC immediate interest rate but the resulting lump sum is not to exceed $25,000.
>
> This formula has been adopted for all plans of WestPoint Pepperell and its subsidiaries which provide for lump sum payouts upon a change in control. The PBGC interest rate during February 1989 is 7- 3/4 %, 120% of which is 9.3%."

Hausen Aff.Ex. Q (Feb. 22, 1989 letter, Roark to EPI Program Participants). Roark's letter appended an election form ("Election Form") which required the EPI Program participants

to either (1) execute a release ("Release")[7] of West Point in order to obtain their lump sum benefit payments or (2) rescind the EPI Amendment. Each Plaintiff elected the lump sum payout and executed the Release of West Point.

By April 5, 1989, Farley completed its tender offer by acquiring more than 90% of West Point's shares. On that same day, each Plaintiff received a lump sum payment of his EPI Program deferred compensation benefits calculated on the basis of a 9.3% discount rate. West Point's use of the PBGC-based discount rate, rather than a 5% discount rate, reduced the amount payable to Plaintiffs under the EPI Amendment by over

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7. The release stated the following:

> I understand that, as a result of the [EPI Amendment] . . ., I am entitled to receive in a lump sum payment the actuarial equivalent of my deferred compensation benefit under the [Deferred Compensation] Agreement. I understand that this lump sum will be calculated using a discount rate equal to 120% of the then current PBGC immediate interest rate . . . I elect to have my deferred compensation benefit paid as a lump sum in the event of a change of control. I understand that the lump sum payment of the actuarial equivalent of my deferred compensation benefit will be in full satisfaction of all obligations of West Point-Pepperell, Inc., as successor to Cluett, Peabody & Co., Inc., under the terms of my Deferred Compensation Agreement, and that in accepting a lump sum payment I shall thereby release West Point-Pepperell, Inc., its directors, officers, employees, and agents, and its successors and assigns, from all obligations under the Agreement.

Hausen Aff.Ex. Q (Feb. 22, 1989 letter, Roark to EPI Program Participants).

$1,000,000. Plaintiffs' checks were accompanied by a letter stating that "by cashing this check you acknowledge that the Company's obligation to make informal payments has been fully satisfied." Defs.' 3(g) Statement Ex. 38 (April 5, 1989 letter, Roark to EPI Program Participants). Each Plaintiff deposited his lump sum payout check without protest.

Defendants contend that at ~~the~~ time they solicited Plaintiffs' Releases and made the lump sum payments, they believed that the West Point Management Pension Committee had properly changed the discount rate applicable to the EPI Amendment from 5% to the 9.3% PBGC-based rate and that West Point was paying Plaintiffs all to which they were entitled.[8] The parties dispute whether any or all of the Plaintiffs believed, at the times they signed the Releases and accepted their lump sum payments, that the payments were properly calculated using the 9.3% PBGC-based rate and that they were receiving all to which they were entitled. *Compare* Pls.' 3(g) Statement ¶¶ 38, 40 and portions of the record cited therein *with* Defs.' Resp. to Pls.' 3(g) Statement ¶¶ 38, 40 and portions of the record cited therein.

In June 1989, West Point made a lump sum payment to employee Virginia Mansfield. This payment was West Point's first lump sum payment pursuant to section 13.2 of the Cluett Pension Plan for an employee retiring after February 16, 1989.[9]

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8. Plaintiffs apparently accept these contentions for purposes of the parties' pending summary judgment motions. *See* Pls.' 3(g) Statement ¶¶ 37, 39.

9. Plaintiffs' April 5, 1989 payments were triggered by a change in control of West Point and made pursuant to the EPI Amendment. Mansfield's payout, on the other hand, was triggered by her retirement and made pursuant to the provisions of the Cluett Pension Plan.

Section 13.2 authorizes the Plan Manager to direct lump sum, rather than monthly, payment of retirement benefits if such benefits are less than $100 per month. Hausen Aff.Ex. F § 13.2 (Cluett Pension Plan). Under this option, the Plan participant is paid the "actuarial equivalent" of his or her monthly benefits. *Id.* West Point used a 5% discount rate in calculating Mansfield's lump sum payment.

6. *Plaintiffs' Counsel and Delay in Seeking Rescission*

Robert D. Krumme was employed by Cluett from 1969 to the beginning of 1986, when West Point acquired Cluett. At the time of his termination, Krumme was Cluett's Vice President and General Counsel. On March 24, 1989, Krumme filed a lawsuit against West Point, contending that West Point should have calculated lump sum payments under the EPI Amendment on the basis of a 5% discount rate, rather than the 9.3% PBGC-based date. Between April and September 1989, Krumme contacted the Plaintiffs to discuss their potential claims and the possibility of their retaining him as counsel. By September 1989, each of the Plaintiffs was aware of Krumme's theory that the Defendants' change of the discount rate was improper. By September 1989, each of the Plaintiffs except Currier and Mandry had signed a retainer agreement with Krumme. Plaintiffs Currier and Mandry signed retainer agreements with Krumme in March and May 1990, respectively.

Krumme hired Robert Hausen of Chadbourne & Parke as Plaintiffs' trial counsel. Krumme and/or Hausen decided, without any participation by the Plaintiffs, to file the complaint in the instant action on June 6, 1990. Prior to the filing of this lawsuit, none of the Plaintiffs ever sought to revoke, rescind, or repudiate their Releases. Each of the Plaintiffs failed to

answer a number of questions at their depositions due to difficulties with memory. Before and during the pendency of an earlier appeal to the Second Circuit, Hausen failed to disclose to the Second Circuit and to Defendants that he was representing Plaintiffs at the request of Krumme, and that Krumme was Plaintiffs' counsel.

7. *Interest on Any Award Pursuant to the EPI Amendment*

The EPI Amendment provides that upon a change of control of West Point, each Plaintiff must receive his lump sum payment within 60 days of the Change in Control Date.[10] The parties agree that Plaintiffs' lump sum payments were due no later than May 30, 1989. The EPI Amendment provides for interest of 2% over the Manufacturers Hanover reference rate on overdue lump sum payments. Manufacturers Hanover merged with Chemical Bank in July 1991, at which time the Manufacturers Hanover reference rate became the Chemical Bank prime rate.

8. Attorney's Fees Pursuant to the EPI Amendment

The EPI Amendment provides the following with respect to West Point's payment of attorney's fees in connection with disputes arising under the amendment:

> If at any time upon or after a Change of Control there should arise any dispute as to the validity, interpretation or application of any term or condition

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10. The Change in Control Date is defined in the EPI Amendment as the end of West Point's fiscal month preceding the occurrence of a Change in Control.

> of this Agreement, . . . Cluett agrees, upon written demand by an Executive, to provide sums sufficient to pay on a current basis (either directly or by reimbursing the Executive or his legal representative) the Executive's costs and reasonable attorneys' fees (including expenses of investigation and disbursements for the fees and expenses of experts, etc.) (a) incurred by the Executive in connection with any dispute or litigation, regardless of whether the Executive is the prevailing party, involving any provision of this Agreement, provided that the court in which such litigation is pursued determines, upon application of any party, that the Executive or his legal representative did not initiate frivolously such litigation.

Hausen Aff.Ex. E ¶ 16 (EPI Amendment).

9. *Joint and Survivor Factor Used in Calculating Payments*

In calculating the lump sum amount due to each Plaintiff, West Point's actuary included the present value of the Plaintiff's joint and survivor benefit. Because of the February 16, 1989 Committee Action, West Point's actuary used a West Point joint and survivor factor of approximately .95, rather than the joint and survivor factor printed in the Cluett Pension Plan.[11] According to Plaintiffs,[12] the use of the West Point joint and

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11. The Cluett Pension Plan contained a joint and survivor factor of .9 increased or decreased by .005 for each year in excess of five that a beneficiary's (*i.e.*, spouse's) age was greater or lesser than a participant's.

12. The Court is unable to determine from Defendants' response to paragraph 57 of Plaintiffs' 3(g) Statement, *see* Defs.' Resp. to Pls.' (Cont'd)

survivor factor rather than the Cluett factor decreased the lump sum payments made to certain of the Plaintiffs.

10. *Early Retirement Assumption Used in Calculating Payments*

The EPI deferred compensation agreement provides that a participant may receive annuity-type benefits on or after reaching age 55, but at a reduction of 1/2 of 1% for each month the participant is less than 65 years of age. In calculating the EPI Program lump sum benefits, West Point's actuary automatically reduced the annuity-type payment (upon which the lump sum was calculated) by 1/2 of 1% for each month any Plaintiff was less than 65 years of age, with a maximum reduction of 60% for those age 55 or younger. West Point's actuary made the early retirement assumption because doing so produced the largest lump sum benefit for each participant on the basis of the actuarial assumptions used.

C. *Procedural History*

Plaintiffs filed their complaint on June 6, 1990. On August 3, 1990, Defendants moved to dismiss the complaint, contending that Plaintiffs' Releases barred their claims. The district court (Conboy, J.) dismissed the complaint on January 25, 1991. The Second Circuit subsequently reversed the district court's decision, holding, inter alia, that "[t]he facts as alleged in the complaint implicate the necessary elements for rescission based on mutual mistake." *Allen v. WestPoint-Pepperell, Inc.*, 945 F.2d 40, 46 (2d Cir.1991).

(Cont'd)

3(g) Statement ¶ 57, whether Defendants dispute the portion of Plaintiffs' assertion included herein. Because the assertion is not dispositive of any pending matter, the Court assumes its validity solely for purposes of this motion.

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DISCUSSION[13]

laintiffs move for summary judgment on their rescission and breach of contract claims.[14] Under the former claim, Plaintiffs contend that because the parties believed that the discount rate applicable to the EPI Amendment had been properly changed, Plaintiffs' Releases were the product of mutual mistake, and, thus, should be rescinded. Under the latter claim, Plaintiffs allege that the Cluett Committee lacked the power under ERISA[15] to change the actuarial assumptions contained in the Cluett Pension Plan.[16] According to Plaintiffs, such a change could only be made pursuant to a formal amendment by the Cluett Board, and, thus, the February 16, 1989 Committee Action did not alter the Cluett Pension Plan's

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13. The parties agree that New York law applies to this diversity action.

14. Plaintiffs also move for summary judgment on a variety of subsidiary issues.

15. Plaintiffs also claim that the Cluett Committee lacked such authority under the terms of the Cluett Pension Plan. Because Plaintiffs' ERISA argument is persuasive, the Court need not, and does not, reach Plaintiffs' contentions with respect to the terms of the Cluett Pension Plan.

16. In moving for reargument, Plaintiffs now direct their ERISA analysis to the August 2 Opinion's interpretation of the terms of the EPI Amendment. Plaintiffs previously aimed their ERISA analysis at the question of whether the Cluett Pension Committee had authority to change the terms of the Cluett Pension Plan. *See* letter from Robert J. Hausen to the Court, dated May 3, 1995, at 2 n.*; Mar. 14, 1995 Oral Arg.Tr. at 11. Plaintiffs' earlier formulation better presented the issue that must be resolved.

discount rate. As a result, Defendants allegedly breached the terms of the EPI Amendment by calculating Plaintiffs' lump sum benefits on the basis of the PBGC-based interest rate rather than the 5% rate printed in the Cluett Pension Plan document.

The Defendants cross-move for summary judgment on Plaintiffs' rescission claim, contending that Plaintiffs' delay in bringing this suit bars such relief. Defendants also cross-move for summary judgment on the breach of contract claim, asserting that the February 16, 1989 Committee Action validly changed the discount rate applicable to lump sum benefits paid under the EPI Amendment.

I. *SUMMARY JUDGMENT STANDARD*

To prevail on summary judgment, the moving party must prove that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). All disputed facts will be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59, 90 S.Ct. 1598, 1609, 26 L.Ed.2d 142 (1970); *Suburban Propane, a Div. of Nat. Distillers and Chemical Corp. v. Proctor Gas, Inc.*, 953 F.2d 780, 788 (2d Cir.1992). A party moving for summary judgment on a claim as to which the nonmoving party bears the burden of proof at trial may demonstrate the absence of a genuine issue of material fact by showing that the nonmoving party lacks evidence to support an essential element of his or her case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The burden then shifts to the nonmoving party to present specific facts establishing that there is a genuine issue to be decided at trial. Fed.R.Civ.P. 56(e); *Celotex*, 477 U.S. at 324, 106 S.Ct. at 2553; *Anderson v. Liberty*

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Lobby, Inc., 477 U.S. 242, 256, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986).

II. *PROMPTNESS*

Defendants argue that the Plaintiffs' delay in asserting their entitlement to rescission of the Releases bars their assertion of such a claim in this suit. Defendants rely on the general New York rule that "an action for rescission must be initiated without unreasonable delay." Allen, 945 F.2d at 47 (citing *Schenck v. State Line Tel. Co.*, 238 N.Y. 308, 313, 144 N.E. 592 (1924)). *See also Grymes v. Sanders*, 93 U.S. 55, 62, 23 L.Ed. 798 (1876) (a party seeking rescission "upon the ground of mistake or fraud . . . must, upon discovery of the facts, at once announce his purpose, and adhere to it . . . He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted"). This is particularly true where the disputed contract involves speculative property, i.e., property "liable to large and constant fluctuations in value." *Grymes*, 93 U.S. at 62 (involving sale of purportedly gold-bearing land). As Defendants correctly note, this "promptness requirement" is not a defense, but an element of plaintiff's case which, unlike the defense of laches, demands no showing of prejudice.[17] *Banque Arabe Et. Internationale D'Investissement v. Maryland Nat'l Bank*, 850 F.Supp. 1199, 1211 and n. 6 (S.D.N.Y.1994), *aff'd*, 57 F.3d 146 (2d Cir.1995); John M. Friedman, *Delay as*

17. Although they claim that they are not asserting a laches defense, Defendants argue that Plaintiffs' nine month delay in commencing this action prejudiced them by permitting the diminution of witness memories and the availability of relevant records. Defendants' claim of prejudice is unconvincing in light of Defendants' failure to notice Plaintiffs' depositions or request document discovery until nearly two and one-half years after Plaintiffs commenced this action.

a Bar to Rescission, 26 Cornell L.Q. 426 at 428 (1941) (*"Delay as a Bar to Rescission"*).[18]

The parties do not dispute that by September 1989, Krumme had discussed his theory of the impropriety of the lump sum payments with the Plaintiffs, and each Plaintiff had retained Krumme to represent him with respect to those payments. Despite the Plaintiffs' knowledge of the basis for their claims, however, they did not commence this suit until June 1990 and took no action prior to that time to notify the Defendants of their intent to rescind. Thus, at a minimum, Plaintiffs delayed well over nine months before giving Defendants notice of their intent to rescind. Krumme attributes this delay to his involvement in pursuing his own suit, obtaining and preparing trial counsel, and drafting a complaint.

The Plaintiffs counter that an exception to the general rule of promptness applies to this case. Certain New York courts have held that a party seeking to rescind a contract need not demonstrate promptness if he or she does not possess property that must be returned in the event of rescission. *Wolf v. Nat'l City Bank of N.Y.*, 170 A.D. 565, 156 N.Y.S. 575, 579 (1st Dep't 1915) (where party sought to rescind a note for which he received nothing of value, court declined to require prompt notice and stated that "we are cited to no case . . . holding that

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18. Plaintiffs allege that Defendants are barred by their "unclean hands" from raising any equitable defenses in this case. Plaintiffs base their argument on the allegation that defense counsel "conceal[ed] . . . the April 24, 1989 5% lump sum calculation for Virginia Mansfield and . . . produc[ed] . . . a false May 11, 1989 PBGC-based calculation in its stead." Pls.' Mem. in Opp. at 24. Because the promptness requirement is an element of Plaintiffs' case, not an equitable defense, the Court need not reach Plaintiffs' allegation of "unclean hands."

. . . notice [of rescission] is necessary in a case like the present, where there is nothing to be returned to the party against whom the rescission is claimed"); *Marin v. Francisca Reyes, Inc.*, 147 Misc. 136, 262 N.Y.S. 577, 578 (Sup.Ct.N.Y.Co.1931), *aff'd mem.*, 238 A.D. 779, 262 N.Y.S. 579 (1st Dep't 1933), *aff'd mem.*, 263 N.Y. 550, 189 N.E. 692 (1933) (purchaser of painting who sought rescission of contract of sale need not provide notice of rescission as he never took possession of the picture); *In re Tagliabue's Estate*, 123 Misc. 666, 206 N.Y.S. 222, 224 (Sur.Ct.1924) (following *Wolf*). *See also Delay as a Bar to Rescission*, *supra* at 434-36 ("[t]he rule of promptness . . . seems to have been relaxed greatly" where the "rescinding party has received nothing of value from the defending party, or where there is nothing to tender back") (footnotes omitted); Walter H.E. Jaeger, *Williston on Contracts* (3d ed. 1970) § 1469 at 201-06 (prompt notice of election to rescind probably only necessary "where the party seeking rescission has received money or property which he must restore as a condition of relief, or where there is further performance due under the contract from the other party which in the absence of notice he might suppose would be accepted in spite of his prior breach") (footnotes omitted).[19]

Plaintiffs argue that the above-mentioned exception applies to this case because Plaintiffs have nothing to return to Defendants in the event of rescission. The EPI Amendment entitles Plaintiffs to lump sum benefit payments upon a "Change in Control." The February 22, 1989 Election Forms and

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19. The absence of returnable property justifies the exception to the promptness requirement because in such a case "there is involved no restoration of the status quo ante except for a declaration that certain contractual rights and duties are voided." *Delay as a Bar to Rescission* at 448.

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Plaintiffs' Releases give Plaintiffs no rights or benefits not already conferred on them by the EPI Amendment, and the parties do not dispute that Plaintiffs are entitled under the EPI Amendment to at least as much money as they received in the April 5, 1989 payments. Accordingly, Plaintiffs received nothing of value under the Releases which would be returnable in the event of rescission.

Defendants attempt to avoid this exception by arguing that it is absent from modern case law.[20] A federal court sitting in diversity is not bound by old state law decisions if the Court is convinced by persuasive data that the highest court of the state would decide otherwise. *Boniuk v. New York Medical College*, 535 F.Supp. 1353, 1357-58 (S.D.N.Y.1982), *aff'd mem.*, 714

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20. Defendants also argue that the applicability of the promptness requirement is the law of this case. This Court disagrees. Defendants raised Plaintiffs' delay to the Second Circuit, which remanded for further proceedings, stating that "[a]n action for rescission must be initiated without unreasonable delay." *Allen*, 945 F.2d at 47. The excerpts of the appellate briefs in the record, however, indicate that the parties did not present the Court of Appeals with the possibility of an applicable exception to the promptness requirement. Hausen Resp.Aff.Ex. N at 17-19 (Defs.' App.Brief); *Id.* Ex. O at 16-18 (Pls.' App.Rep.Brief). Instead, Plaintiffs argued that the reasonableness of their delay could not be determined on the available record. *Id.* Ex. O at 18 (Pls.' App.Rep.Brief). The Court of Appeals apparently agreed with this argument, concluding that "[a]t this point in the litigation . . . there is little evidence probative of the reasonableness of any delay in bringing this action." *Allen*, 945 F.2d at 47. Accordingly, the Second Circuit did not determine whether the promptness requirement should apply to this case in which the parties seeking relief need not return any property in the event of rescission. *See e.g. Exxon Corp. v. United States*, 931 F.2d 874, 877 (Fed.Cir.1991) (trial court is not constrained "with respect to issues not actually decided by an appellate court").

F.2d 111 (2d Cir.1982) (quoting *West v. American Teleph. & Teleg. Co.*, 311 U.S. 223, 237, 61 S.Ct. 179, 183, 85 L.Ed. 139 (1940)). No case to which Defendants cite, however, even addresses the exception advanced by Plaintiffs, let alone finds it inapplicable or unpersuasive. Further, for the reasons explained below, the recent judicial silence on the issue does not eliminate the exception.

First, certain of the cases cited by Defendants are inapplicable to the issue at hand. *See e.g. Johns Hopkins Univ. v. Hutton*, 488 F.2d 912, 917 (4th Cir.1973), *cert. denied*, 416 U.S. 916, 94 S.Ct. 1622, 1623, 40 L.Ed.2d 118 (1974) (no application of New York law and case involved speculative property); *Baumel v. Rosen*, 412 F.2d 571, 574 (4th Cir.1969), *cert. denied*, 396 U.S. 1037, 90 S.Ct. 681, 688, 24 L.Ed.2d 681 (1970) (same); *Dalessandro v. Monk*, 1988 WL 42136, *2, 1988 U.S.Dist. LEXIS 3511, 7 (S.D.N.Y. Dec. 14, 1988) (plaintiff did not seek rescission, and although prompt notice was given, plaintiff waived objections to contract by accepting benefits thereunder); *Gamble v. Cornell Oil Co.*, 154 F.Supp. 581, 586-87 n. 15 (W.D.Okl.1957), aff'd, 260 F.2d 860 (10th Cir.1958) (plaintiffs never sought rescission of contract); *New York Tel. Co. v. Jamestown Tel. Corp.*, 282 N.Y. 365, 371-73, 26 N.E.2d 295 (1940) (court addressed sufficiency of notice under contract terms, not promptness rule).

Second, many of the cases cited by Defendants involve property (or some other object of value) returnable upon rescission. *See e.g.* Grymes, 93 U.S. at 62; *Dalessandro*, 1988 WL 42136 at *2, 1988 U.S.Dist. LEXIS at 7; *In re Domestic Fuel Corp.*, 79 B.R. 184, 196 (Bankr.S.D.N.Y.1987); *Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp.*, 184 F.Supp. 116, 118 (S.D.N.Y.1959), *aff'd*, 274 F.2d 805 (2d

Cir.1960), *cert. denied*, 363 U.S. 843, 80 S.Ct. 1612, 4 L.Ed.2d 1727 (1960); 88 *Blue Corp. v. Reiss Plaza Assocs.*, 183 A.D.2d 662, 585 N.Y.S.2d 14, 16 (1st Dep't 1992); *Gannett Co., Inc. v. Register Pub. Co.*, 428 F.Supp. 818, 826 (D.Conn.1977); *Faske v. Gershman*, 30 Misc.2d 442, 215 N.Y.S.2d 144, 148 (Mun.Ct.Bo.Manh.1961); *Sy-Jo Luncheonette, Inc. v. Marsav Distributors, Inc.*, 279 A.D. 715, 108 N.Y.S.2d 349, 351 (1st Dep't 1951), *aff'd*, 304 N.Y. 747, 108 N.E.2d 614 (1952). Further, in a number of Defendants' cases, the courts explicitly found an absence of any grounds for rescission and, thus, did not need to reach the question of whether a lack of promptness, absent any prejudice, precludes rescission by a party that can assert a valid ground for such relief. *See, e.g., Grymes*, 93 U.S. at 62; *Banque Arabe*, 850 F.Supp. at 1215-26; *In re Domestic Fuel Corp.*, 79 B.R. at 195; 88 *Blue Corp.*, 585 N.Y.S.2d at 16; *Powell v. Oman Const. Co.*, 25 A.D.2d 566, 267 N.Y.S.2d 862, 864 (2d Dep't 1966); *Jerrose Management Corp. v. Garnett*, 33 Misc.2d 307, 226 N.Y.S.2d 503, 506-08 (Sup.Ct.N.Y.Co.1962); *Faske*, 215 N.Y.S.2d at 148; *Sy-Jo Luncheonette*, 108 N.Y.S.2d 349, 351.[21]

In short, the Defendants have cited to no analogous case, and the Court is aware of none, in which a court applying New York law used the promptness requirement as the sole basis for denying rescission to a party possessing nothing of value

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21. Defendants cite to only one case in which (1) rescission may not have required the return of property and (2) the Court did not find an absence of grounds for rescission as a matter of law. *Port Chester Elec. Construction Corp. v. Hastings Terraces, Inc.*, 284 A.D. 966, 134 N.Y.S.2d 656, 658 (2d Dep't 1954). That case, however, is inapposite because the party seeking rescission affirmed the contract by repeatedly failing to raise its duress defense until after filing both an answer and amended answer. *Id.*

that would be returnable in the event of rescission. Thus, Defendants have failed to present the Court with persuasive authority indicating that the New York Court of Appeals would not recognize the propounded exception to the promptness requirement. Accordingly, the Court applies that exception, rather than the promptness requirement, to this case.[22]

III. *BREACH OF CONTRACT*

The parties' cross-motions for summary judgment on Plaintiffs' breach of contract claim turn upon a determination of what rate was "contained in" the Cluett Pension Plan after the February 16, 1989 Committee Action. At all relevant times, the Cluett Pension Plan *document* contained a discount rate of 5%, and the Cluett Board *never voted to* amend that rate. Nonetheless, Defendants contend that the February 16, 1989 Committee Action changed the discount rate contained in the Plan from 5% to the PBGC-based rate. Plaintiffs counter that the February 16, 1989 Committee Action was ineffective under ERISA to change the terms of the Cluett Pension Plan.[23]

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22. For the reasons stated, the Court need not determine whether Plaintiffs gave prompt notice of their intent to rescind. Nonetheless, to avoid an unnecessary remand of this suit, the Court will make such a finding. To satisfy the promptness requirement, a party seeking to rescind must give notice of his or her intentions within a "reasonable" period of time, Allen, 945 F.2d at 47. The court determines whether the time period is reasonable by examining the particular facts of the case. Delay as a Bar to Rescission, supra at 448. Under these standards, and in the circumstances of this case, the Plaintiffs' delay of more than nine months in notifying the Defendants of their intent to rescind was clearly not reasonable and, thus, not prompt.

23. Plaintiffs also argue that even if the February 16, 1989 Committee action changed the rate applicable to the Cluett Pension Plan, (Cont'd)

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As a preliminary matter, Defendants argue that Plaintiffs' ERISA analysis is flawed because: (1) the EPI Program was a "top-hat" plan exempt from the ERISA requirements ordinarily applicable to employee benefit plans; and (2) Plaintiffs pled no claim under ERISA, and any such claim would now be barred by the applicable statute of limitations. Defendants arguments are unpersuasive. Plaintiffs do not contend that ERISA's requirements *directly* govern the EPI Amendment. Rather, Plaintiffs correctly note that those requirements *indirectly* affect the EPI Amendment because they govern the terms of the Cluett Pension Plan. Similarly, Plaintiffs do not pursue a claim or remedy under ERISA, but simply argue that ERISA's requirements are relevant to interpreting the terms of the Cluett Pension Plan and EPI Amendment. Thus, Plaintiffs' ERISA analysis is relevant to the Court's determination of the parties' motions.

ERISA requires that "[e]very employee benefit plan . . . be established and maintained pursuant to a written instrument" and "specify the basis on which payments are made . . . from the plan." 29 U.S.C. §§ 1102(a)(1), (b)(4). The purpose of the written document requirement is to allow an employee "*on examining the plan documents*, [to] determine exactly what his rights and obligations are under the plan." *Curtiss-Wright Corporation v. Schoonejongen*, __ U.S. __, __, 115 S.Ct. 1223, 1230, 131 L.Ed.2d 94, 103 (1995) (quoting H.R.Rep. No. 93-1280, p. 297 (1974) U.S.Code Cong. & Admin.News 1974 pp. 4639, 5077, 5078) (emphasis added by quoted case).

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the new rate only applied to benefits accrued after that change. Because the Court finds in Plaintiffs' favor on their first argument, it need not and does not, reach this "split rate" issue.

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ERISA also requires that every benefit plan "provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan. . . ." 29 U.S.C. § 1102(b)(3).[24] The Cluett Pension Plan explicitly states that "[t]he Board of Directors reserves the right . . . to . . . amend . . . the [Cluett Pension] Plan." Hausen Aff.Ex. F § 11.1 (Cluett Pension Plan). The Cluett Pension Plan also specifies that the Cluett Board's amendment authority is exclusive: "The Company acting through the Board of Directors shall have the sole authority to . . . amend or terminate, in whole or in part, the Plan. . . ." Pls.' Supp.Authorities Ex. D § 9.1 (Cluett Pension Plan). These clauses adequately identify both the persons capable of amending the Plan — i.e., the Cluett Board--and the procedure for making such an amendment — i.e., a decision to amend by the Cluett Board. *Curtiss-Wright*, __ U.S. at __, __, 115 S.Ct. at 1228-29, 131 L.Ed.2d at 102-03.[25]

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24. ERISA provides beneficiaries with certain safeguards in connection with the amendment of benefit plans. For example, the statute requires pre- and post-amendment notification to affected beneficiaries of significant reductions in the rate of future benefit accrual, 29 U.S.C. § 1054(h), and prohibits retroactive decreases in accrued benefits, 29 U.S.C. § 1054(g).

25. Defendants cannot argue that the Cluett Committee possesses any "amendment" authority as that term is used in the Plan. Such authority is unambiguously and exclusively granted to the Cluett Board. Pls.' Supp. Authorities Ex. D § 9.1 (Cluett Pension Plan); Hausen Aff.Ex. F § 11.1 (Cluett Pension Plan). Defendants could argue, however, that the Plan's and ERISA's use of the term "amendment" are not synonymous and that the Plan sufficiently defines, for purposes of ERISA, the Cluett Committee as the amending authority, and the Cluett Committee's decisions as the amending procedure, with respect to actuarial factors. This argument is unavailing. The Plan's explicit grant of exclusive "amendment" authority to the Cluett Board renders any

(Cont'd)

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Under ERISA, a change in the terms of a benefit plan is only valid if made in writing pursuant to the amendment procedure and by the amending authority set forth in the benefit plan. *Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 58-59 (4th Cir.1992) (modifications to a plan must be in writing and in conformity with formal amendment procedures), *cert. denied*, 506 U.S. 1081, 113 S.Ct. 1051, 122 L.Ed.2d 359 (1993); *Singer v. Black & Decker Corp.*, 964 F.2d 1449, 1453-1454 (4th Cir.1992) (Wilkinson, J., concurring) ("written modification must be adopted in conformity with the amendment procedures set out in the plan in order to have effect"); *Alday v. Container Corp. of America*, 906 F.2d 660, 665 (11th Cir.1990) (a plan cannot be changed by an oral or informal written amendment), *cert. denied* 498 U.S. 1026, 111 S.Ct. 675, 112 L.Ed.2d 668 (1991); *Washington Nat. Ins. Co. v. Hendricks*, 855 F.Supp. 1542, 1556-57 (W.D.Wis.1994) (a writing that does not comply with the amendment procedures of the plan cannot become part of the plan). Because the Plan sets forth an amendment procedure that may only be utilized by the Cluett Board, the Cluett Committee had no authority under ERISA to change the terms of the Plan.

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other purported grant of such authority hopelessly ambiguous. Such an ambiguous delegation is completely at odds with (1) ERISA's requirement that benefit plans be maintained pursuant to written instruments which identify the plan's amendment authority and procedure, 29 U.S.C. §§ 1102(a)(1), (b)(3), and (2) the writing requirement's purpose of enabling beneficiaries to "determine exactly" what their rights are under the plan by examining the plan documents, *Curtiss-Wright*, __ U.S. at __, 115 S.Ct. at 1230, 131 L.Ed.2d at 103. Accordingly, the Court finds that the Plan does not adequately define, under the requirements of ERISA, the Cluett Committee as the amending authority with respect to actuarial factors.

The Court's conclusion in this respect arguably renders meaningless the Plan's grant of authority to the Cluett Committee to adopt actuarial factors from time to time. That authority was not without substance when first granted, however. Prior to 1983, the Cluett Plan document did not set forth the factors currently applicable under the Plan, but simply defined the factors as those adopted by the Committee. Thus, prior to 1983, the Cluett Committee could change the Plan's actuarial factors simply by adopting new ones, without amending any of the terms of the original Plan document. Such an adoption would probably not have constituted an amendment of the Plan under ERISA. *See, e.g., Stewart v. National Shopmen Pension Fund,* 730 F.2d 1552, 1563 (D.C.Cir.), cert. denied, 469 U.S. 834, 105 S.Ct. 127, 83 L.Ed.2d 68 (1984) (mere exercise of a plan provision held not an amendment for certain ERISA purposes); *Dooley v. American Airlines, Inc.*, 797 F.2d 1447, 1450-52 (7th Cir.1986), *cert. denied,* 479 U.S. 1032, 1087, 107 S.Ct. 879, 1292, 93 L.Ed.2d 833, 94 L.Ed.2d 149 (1987) (where (1) plan provided that employer could approve actuarial factors from time to time, (2) employer approved certain actuarial factors pursuant to the plan provision, and (3) employer later approved new factors, latter action was not an amendment of the plan). Accordingly, it was not until Cluett's 1983 addition of the current actuarial factors that the Plan presented a possible conflict between the Cluett Board's and Cluett Committee's authority. The Court, presented with that conflict, reads the Plan in the manner which complies with ERISA's requirement that changes only be made pursuant to a defined amendment procedure by a defined amending authority.

The Cluett Board undisputedly did not act to amend the Cluett Pension Plan.[26] Accordingly, the 5% discount rate printed in the

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26. Mr. Henley's testimony regarding the Cluett Board's acquiescence in the change fails to raise a genuine issue of material fact (Cont'd)

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Cluett Pension Plan was never validly changed and was at all relevant times one of the actuarial assumptions "contained in" the Cluett Pension Plan for purposes of the EPI Amendment.[27]

IV. *MUTUAL MISTAKE*

The mistake which Plaintiffs argue vitiates their releases is "the parties mutual lack of awareness that, under the EPI Amendment, [Plaintiffs] were entitled to a lump sum amount calculated at a 5% discount rate." *Allen*, 945 F.2d at 46. The Defendants contend that at the time they solicited Plaintiffs'

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in this respect. *See* Defs.' 3(g) Statement Ex. 55 at 141-46 (Henry H. Henley Dep. Tr.). As a preliminary matter, Mr. Henley could not remember whether the West Point Board had been informed of the Cluett Committee's attempt to adopt a new discount rate before or after the Committee's action. Further, Mr. Henley did not testify that the Cluett Board amended the Cluett Pension Plan in accordance with the Cluett Committee's action or that the Cluett Board took any other steps to adopt the Cluett Committee's action. He simply testified that he did not object to the news and recalls no objection of other Cluett Board members. The Court does not believe that the Cluett Board's failure to object to notice of the Cluett Committee's adoption of a new discount rate constitutes a decision or action to amend the Cluett Pension Plan. In addition, Defendants have produced no Board meeting minutes reflecting the discussion Mr. Henley describes. Pls.' Resp. to Defs.' 3(g) Statement ¶ 64. Thus, even if the Board's lack of protestation could constitute a decision to amend, that amendment would fail to satisfy the requirement that amendments be in writing. *Coleman*, 969 F.2d at 58-59.

27. The term "contained in" the Cluett Pension Plan is arguably subject to different interpretations. Under no reasonable interpretation, however, could a rate other than 5% be "contained in" the Cluett Pension Plan if the February 16, 1989 Committee Action did not validly change the terms of that Plan.

Releases and made the EPI lump sum payments, they believed that the February 16, 1989 Committee Action had changed the applicable discount rate to the 9.3% PBGC-based rate. Plaintiffs argue that their own mistaken belief "inevitably follows" from that of the Defendants' "since [P]laintiffs' mistake was caused by, and is completely derivative of, West Point's mistake." Pls.' Mem. in Supp. at 22. Plaintiffs claim that their mistaken belief was induced by Roark's letter to the Plaintiffs, which stated that the 9.3% PBGC-based rate, not a 5% rate, would be used in calculating lump sum values. Hausen Aff.Ex. Q (Feb. 22, 1989 letter, Roark to EPI Program Participants).

As a preliminary matter, Defendants oppose Plaintiffs' mutual mistake claim on the grounds that the parties' alleged mistake could easily have been discovered when Plaintiffs were first notified of the PBGC-based rate. *See DaSilva v. Musso*, 53 N.Y.2d 543, 551, 444 N.Y.S.2d 50, 428 N.E.2d 382 (1981) (quoting Grymes, 93 U.S. at 61) (rescission on the basis of mistake unavailable "where the means of knowledge were easily accessible"). Defendants' argument must be rejected. Contrary to Defendants' contention, Defs.' Mem. in Opp. at 16, the issue dispositive of Plaintiffs' mistake claim is not whether the Cluett Board voted to change the Plan's discount rate, but whether Cluett validly changed that rate absent such a vote. The Court's resolution of this issue has required a complicated legal analysis of the EPI Amendment, the Cluett Pension Plan, and the requirements of ERISA. Further, Plaintiffs' mistake was allegedly based, at least in part, on representations by Defendants that Cluett had validly changed the rate. Thus, Defendants have failed to provide any evidence that "the means of knowledge were easily accessible" to Plaintiffs.

Plaintiffs' awareness of their entitlement to a lump sum payment based on the 5% discount rate is, however, an issue of fact inappropriate for summary judgment disposition. "In light of the court's obligation to draw all reasonable inferences against the nonmoving party, summary judgment is rarely appropriate where the moving party's state of mind is a material issue." *Equal Employment Opportunity Comm'n v. Home Ins. Co.*, 672 F.2d 252, 257 (2d Cir.1982). *See also* 10A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure § 2730 at 238* (2d ed. 1983) (summary judgment on state of mind is often inappropriate because such a determination "usually entails the drawing of factual inferences as to which reasonable [persons] might differ — a function traditionally left to the jury . . ."). Further, contrary to Plaintiffs' assertions, Pls.' 3(g) Statement ¶¶ 38, 40, their submissions do not establish as a matter of law that each of the Plaintiffs believed, at the time he executed his Release and accepted his lump sum payment, that such payment was properly calculated on the basis of a 9.3% discount rate and that he was receiving all to which he was entitled. *See, e.g.*, Hausen Aff. Ex EE at 29-30, 48 (Currier Dep.); *Id.* Ex. FF (Dunne Dep.) at 42-43, 55-56; *Id.* Ex. GG at 53-54, 73 (Fornero Dep.); *Id.* Ex. KK at 75, 100 (Pallota Dep.). Accordingly, Plaintiffs' claim for rescission on the grounds of mutual mistake presents material issues of fact which must be resolved by the fact finder.

V. *JOINT AND SURVIVOR AND EARLY RETIREMENT FACTORS*

The EPI Program provides for a joint and survivor benefit — a benefit paid monthly to the participant for his life, and 50% of that benefit paid to the participant's spouse for her life after the participant's death. Thus, to determine the amount of

each Plaintiff's lump sum payment, West Point had to ascertain the actuarial equivalent of future payments to the participant's spouse as well as to each participant. To do so, the actuary divided each participant's benefit by a "joint and survivor factor." In calculating Plaintiffs' lump sum payments, West Point's actuary used a joint and survivor factor of .95 taken from the West Point Pension Plan, rather than the .9 joint and survivor factor printed in the Cluett Pension Plan. The actuary believed that the February 16, 1989 Committee Action made the West Point assumptions applicable to the Cluett Pension Plan. Plaintiffs contend that "[i]f this Court finds that the committee's action was ineffective to change the assumptions applicable to the November 11, 1988 EPI Amendment, then . . . a Cluett joint and survivor factor should be used to calculate the appropriate lump sum benefit." Pls.' Mem. in Supp. at 19.

In calculating Plaintiffs' lump sum payments, West Point's actuary also assumed that each participant would elect the EPI's early retirement option, which allowed participants to receive their monthly benefits prior to age 65 at a reduction of 1/2 of 1% for each month before age 65 that he began receiving benefits. The actuary assumed the participants' election of the early retirement reduction because the option was favorable to the participants under the actuarial assumptions used. Plaintiffs contend that "if this Court finds a 5% discount rate applicable, it should also hold that the early retirement factor should not be applied to the extent it may reduce the lump sum benefits due any of the plaintiffs." Pls.' Mem. in Supp. at 20.

Defendants argue that Plaintiffs' joint and survivor and early retirement factor claims are not properly before the Court because they are outside the scope of Plaintiffs' complaint. Defendants contend that "[a]t *no* time during the past five years

did [P]laintiffs provide West Point with any notice that the joint and survivor factors or the early retirement factors were in issue." Defs.' Mem. in Opp. at 17 (emphasis in original). Plaintiffs do not claim to have provided West Point with such notice. A motion for summary judgment is not the appropriate place to present new claims which effectively amend the complaint. *See Coppola v. Connecticut Student Loan Found.*, 1989 WL 47419, *3 n. 14 (D.Conn. Mar. 2, 1989) (Cabranes, J.). Accordingly, Plaintiffs' motion for summary judgment on the joint and survivor and early retirement factors is denied.

VI. *ATTORNEY'S FEES*

The EPI Amendment provides for West Point's payment of an executive's attorney's fees on a current basis "[i]f at any time upon or after a Change of Control there should arise any dispute as to the validity, interpretation or application of any term or condition of this Agreement . . . regardless of whether the Executive is the prevailing party." Hausen Aff.Ex. E ¶ 16 (EPI Amendment). Plaintiffs seek summary judgment on their entitlement to attorney's fees in connection with this suit. By its terms, the EPI Amendment only provides for the payment of attorney's fees in connection with disputes that arise "upon of after a Change of Control." Plaintiffs contend that their dispute arose on April 5, 1989, by which time the parties agree a change of control had occurred, and at which time Defendants paid them their lump sum payments on the basis of the PBGC-based interest rate. Defendants challenge Plaintiffs' entitlement to attorney's fees, arguing that the EPI Amendment's attorney's fee provision "served to deter acquirors from reneging on prior management's promises," and does not apply to disputes arising out of prior management's administration of change in control benefits. Defs.' Mem. in Opp. at 18.

The dispositive question is when the Plaintiffs' dispute "arose" for purposes of the EPI Amendment. Despite Plaintiffs' contentions that their dispute arose at the time of their lump sum payments, other dates — such as, inter alia, the time of the February 16, 1989 Committee Action or of Roark's February 22, 1989 letter — are also plausible trigger dates under the attorney's fee provision. The parties' submissions do not establish as a matter of law any particular triggering event or date. Thus, the applicability of the attorney's fee provision cannot yet be decided, and summary judgment on Plaintiffs' entitlement to attorney's fees is denied. Compare Brodie Aff.Ex. 3 at 4 (*Krumme v. West Point-Pepperell, Inc.*, 735 F.Supp. 575 (S.D.N.Y.1990) (Mem.End.) (finding issue of fact with respect to plaintiff's entitlement to attorney's fees in the Krumme action).

VII. *INTEREST*

According to the terms of the EPI Amendment, Plaintiffs' lump sum payments were due no later than May 30, 1989. The EPI Amendment provides for interest on overdue payments at 2% over the Manufacturers Hanover reference rate. Manufacturers Hanover merged with Chemical Bank in July 1991, at which time the Manufacturers Hanover reference rate became the Chemical Bank prime rate. Plaintiffs move for summary judgment on their contractual entitlement to interest on any award they receive in this action. Defendants do not oppose this portion of the Plaintiffs' motion. The EPI Amendment is unambiguous on this point and the Court may therefore resolve the issue as a matter of law. *See e.g. John Hancock Mut. Life Ins. Co.*, 22 F.3d at 461. If Plaintiffs obtain a judgment recognizing their right to lump sum payments in excess of those they received, then they will be entitled to

interest on the amount of their underpayment at a rate of 2% over the Chemical Bank prime rate.

CONCLUSION

For the reasons stated, the Court grants Plaintiffs' motion for reargument; denies Defendants' cross-motion for partial summary judgment; and grants in part and denies in part Plaintiffs' cross-motion for partial summary judgment.

In summary, the Court holds that:

(1) the "promptness requirement" does not apply to this suit;

(2) the Cluett Committee's attempt to amend the terms of the Cluett Pension Plan was ineffective under ERISA;

(3) for purposes of the EPI Amendment, the Cluett Pension Plan "contained" a discount rate of 5% at all times relevant to this lawsuit;

(4) Defendants have failed to provide evidence demonstrating that the parties' alleged mutual mistake was easily discoverable;

(5) Plaintiffs' claim for rescission based on mutual mistake presents genuine issues of material fact as to the Plaintiffs' beliefs at the times they signed the Releases and accepted their lump sum payments;

(6) Plaintiffs joint and survivor and early retirement factor claims, which were not previously raised, are not appropriate for summary judgment disposition;

(7) Plaintiffs have failed to establish as a matter of law that they are contractually entitled to attorney's fees under the EPI Amendment;

(8) Plaintiffs are entitled to interest of 2% over the Chemical Bank prime rate on any award they obtain for underpayment of their deferred compensation benefits under the EPI Amendment.

Although the Court holds that the discount rate applicable to the EPI Amendment is 5%, Plaintiffs' Releases may preclude judgment in their favor on the breach of contract claims. Accordingly, the issue remaining for the trier of fact on both Plaintiffs' breach of contract and rescission claims is whether the Releases were the product of mutual mistake and, thus, subject to rescission. Plaintiffs' claim of entitlement to attorney's fees under the EPI Amendment requires the trier of fact to determine when Plaintiffs' dispute under that contract arose. Also remaining for trial are all claims in Plaintiffs' complaint not addressed by the present motions for partial summary judgment.

SO ORDERED.

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING FILED JULY 9, 1998

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

CAROLYN CLARK CAMPBELL
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 8 day of July one thousand nine hundred and ninety-eight.

Dkt No: 97-7312

Krumme

Plaintiff-Appellee

v

West Point-Pepperell

Defendant-Appellant

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellee Gordon Allen et al.

Appendix E

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

CAROLYN CLARK CAMPBELL, Clerk

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(2)

FILED
NOV 5 - 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-585

In The

Supreme Court of the United States

October Term, 1998

ROBERT D. KRUMME, *et al.*,

Petitioners,

vs.

WESTPOINT STEVENS INC., formerly known as WEST POINT-PEPPERELL, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioners, who participated in a non-ERISA-qualified deferred compensation plan that incorporated by reference the discount rate contained in an ERISA-qualified pension plan, may collaterally challenge the pension plan administrators' action to change the pension plan's discount rate, where Petitioners brought no claims as participants or beneficiaries of the pension plan and failed to avail themselves of the pension plan's administrative review procedures?

2. Whether nine of the Petitioners, who released their claims under a deferred compensation agreement, should be permitted to argue that the discount rate applicable to a change in control amendment to the deferred compensation agreement was improperly changed, after the district court found as a matter of fact that their releases were valid and should not be rescinded?

3. Whether the written record of a pension plan committee's decision to change the plan's discount factor upon the advice of the plan's independent actuary constitutes a document or instrument governing the plan, where the pension plan expressly provides that "the records of the Committee shall be conclusive and binding upon the Company, Participants, and all persons having any interest under the Plan"?

RULE 29.6 STATEMENT

Respondent WestPoint Stevens Inc., formerly known as West Point-Pepperell, Inc., is a Delaware corporation that has publicly traded shares. It has no parent corporation. WestPoint Stevens Inc. owns 100% of the equity of each of its subsidiaries.

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Respondents WestPoint Stevens Inc. ("WestPoint"), C. Powers Dorsett and D. Michael Roark respectfully submit this brief in opposition to the Petition filed by Robert D. Krumme, *et al.* ("Petitioners") for a writ of certiorari to the United States Court of Appeals for the Second Circuit.[1]

OPINIONS BELOW

The opinion of the Court of Appeals (P. App. 1a-37a) is reported at 143 F.3d 71 (2d Cir. 1998). Relevant opinions of the District Court are reported at 1996 WL 2004 (S.D.N.Y. Jan. 3, 1996) (R. App. 1a-14a), 933 F. Supp. 261 (S.D.N.Y. 1996) (R. App. 15a-35a), and 954 F. Supp. 682 (S.D.N.Y. 1997), as amended in an unpublished opinion which appears at R. App. 36a-64a.

STATUTES INVOLVED

In addition to the statutory provisions cited by Petitioners, the following statutes are involved:

29 U.S.C. § 1051(2) provides:

> § 1051. **Coverage**
>
> This part shall apply to any employee benefit plan described in section 1003(a) of this title (and not exempted under section 1003(b) of this title) other than — . . .

---

1. Petitioners' Petition for a Writ of Certiorari will be cited herein as "Pet." The Appendix to the Petition for a Writ of Certiorari will be cited as "P. App." Portions of the record below cited herein, if not appended to the Petition for Certiorari, are annexed in an Appendix hereto, which is cited as "R. App." Emphasis in passages quoted herein is ours unless otherwise indicated.

> (2) a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees;

29 U.S.C. § 1101(a)(1) provides:

> § 1101. **Coverage**
>
> (a) This part shall apply to any employee benefit plan described in section 1003(a) of this title (and not exempted under section 1003(b) of this title), other than —
>
> (1) a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees; or

STATEMENT OF THE CASE

Respondents herein incorporate by reference the Background discussion in the Second Circuit's May 1, 1998 opinion (P. App. 4a-25a). Respondents also incorporate by reference the findings of fact from the District Court's May 13, 1996 opinion denying the *Allen* plaintiffs' request to rescind their releases (R. App. 15a-35a) and the District Court's February 10, 1997 opinion denying the *Allen* plaintiffs' misrepresentation claims (R. App. 36a-64a).

This case arises from WestPoint's efforts in 1989 to correct an outdated discount rate mistakenly included in a deferred compensation plan (the "EPI Program") maintained for senior executives of its wholly-owned subsidiary, Cluett Peabody & Co. ("Cluett"). P. App. 8a-9a.

In 1988, participants in various benefit plans of WestPoint and its subsidiaries were offered "Change in Control" amendments that would permit the present value of their future benefits to be paid in a lump sum in the event the company was taken over. P. App. 5a. The Change in Control amendment for the EPI Program (the "EPI Amendment") was executed by participating Cluett executives ("EPI participants") in late 1988. P. App. 8a.

To determine the EPI participants' lump sums, it was intended that the EPI Amendment incorporate the floating, Pension Benefit Guaranty Corporation ("PBGC")-based discount rate contained in WestPoint's Employee Retirement Plan and referenced in all the other Change in Control amendments to WestPoint's employee benefit plans. R. App. 15a-24a, 31a n.6, 53a. By mistake, however, WestPoint incorporated by reference the discount rate contained in *Cluett's* Employee Retirement Plan (the "Cluett Plan") — an outdated, below-market, fixed rate of 5%. P. App. 8a-9a. At relevant times, the PBGC-based discount rate was approximately 9.3%, or nearly twice the rate in the Cluett Plan. P. App. 9a; R. App. 25a-26a, 30a-32a, 60a-62a. (The lower the discount rate, the larger the resulting lump sum payout to executives.)

In November 1988, Farley, Inc. launched a hostile bid for WestPoint. During the takeover fight, WestPoint discovered the error in the EPI Amendment. WestPoint reviewed the Cluett Employee Retirement Plan, the source of the outdated discount rate, and found that the discount factor in the Cluett Plan could be changed by the Committee appointed to administer the Cluett Plan (the "Committee"), on advice of the plan actuary. Accordingly, upon the recommendation of the plan actuary, the Committee changed the Cluett Plan's discount rate to the PBGC-based formula on February 16, 1989. That change was duly recorded in the minutes of the Committee. P. App. 9a-10a; R. App. 25a, 72a-73a, 74a.

At the time, Petitioner Robert D. Krumme ("Krumme"), a former General Counsel of Cluett, protested that he and others had relied on the 5% rate in executing the EPI Amendment. Consequently, WestPoint notified all the EPI participants of the 9.3% discount rate and offered them the opportunity: (i) to accept the new rate and release WestPoint, or (ii) to revoke their EPI Amendments and return to the original stream of future payments provided under the EPI Program. P. App. 11a; R. App. 75a-76a. Most EPI participants executed Election Forms in which they accepted the 9.3% discount rate and released WestPoint from all further obligations under the EPI program. Krumme, however, sued WestPoint for breach of contract on March 24, 1989 in the United States District Court for the Southern District of New York. *Krumme v. WestPoint-Pepperell, Inc.*, 89 Civ. 3841 (S.D.N.Y.).

A Change in Control occurred on April 5, 1989. R. App. 2a, 14a. The EPI participants who had signed releases were paid lump sums discounted at 9.3% upon the Change in Control. In June 1990, nine EPI participants who had signed releases sued WestPoint, and three of its executives individually, for breach of contract, breach of fiduciary duty, fraud, mutual or unilateral mistake, and failure to pay wages. *Allen v. West Point-Pepperell, Inc.*, 90 Civ. 3841 (S.D.N.Y.) ("*Allen*"). Krumme had recruited all the *Allen* plaintiffs to sue WestPoint before the end of September 1989, and had entered into contingent-fee contracts to represent each of them. P. App. 13a.

A. The District Court Decisions

In November 1995, the District Court granted partial summary judgment to the *Allen* plaintiffs as to the applicable discount rate, and later applied that ruling to Krumme. The District Judge concluded that the Committee's attempt to change the discount rate in the Cluett Plan was ineffective under

ERISA and, for purposes of the EPI Amendment, the Cluett Plan contained a 5% discount rate at all relevant times. P. App. 79a. The District Court stated that, because the Cluett Plan set forth a procedure under which the power to amend was reserved to the Board of Directors, the Committee had no authority under ERISA to change the Cluett Plan's terms. P. App. 71a. The District Judge recognized that her ruling "arguably render[ed] meaningless the Plan's grant of authority to the Cluett Committee to adopt actuarial factors from time to time." P. App. 72a.

Krumme, the *Allen* plaintiffs and WestPoint agreed to try four issues to the Court: (i) the date on which a Change in Control occurred (tried in December 1995); (ii) whether the *Allen* plaintiffs could rescind their releases based on mutual mistake (tried in January 1996); (iii) whether the EPI Amendment required WestPoint to pay the attorneys' fees and costs incurred by Krumme or the *Allen* plaintiffs; and (iv) the *Allen* plaintiffs' claims for damages based on misrepresentation (tried on papers in the Fall of 1996). P. App. 17a.

After a bench trial on Change in Control, the District Court found that the Change in Control occurred on April 5, 1989. R. App. 2a, 14a. No party appealed that decision.

After a bench trial on rescission and attorneys' fees, the District Court declined to rescind the releases executed by the nine *Allen* plaintiffs. The District Court found that the change in the discount rate was "a good-faith effort to correct [a] drafting mistake" (R. App. 31a), and further found that rescinding the releases "would create an entirely unfair result" by forcing WestPoint to pay the *Allen* plaintiffs "nearly twice the market-based present value of their EPI benefits." R. App. 31a. Such an outcome "would undermine the WestPoint Board's understandable desire to harmonize the payout methodologies

used in its various benefit plans," the District Judge observed. Moreover, the District Court found, rescission would give the *Allen* plaintiffs "an undeserved and unintended windfall." R. App. 31a.

After a bench trial on the *Allen* plaintiffs' claims for damages based on alleged misrepresentations concerning the discount rate, the District Court found that WestPoint and the individual defendants had not made any false representations. R. App. 52a-53a. The District Court found "no concrete possibility" that the change in the discount rate resulted from a purported conflict of interest on the part of WestPoint executives. R. App. 55a. The District Court concluded that the *Allen* plaintiffs had produced "no evidence that casts doubt on the veracity" of testimony that the defendant WestPoint executives did not expect to benefit personally from changing the discount rate. R. App. 55a. Based on the *Allen* plaintiffs' failure of proof, the District Court found WestPoint and the individual defendants not liable for fraudulent omission, constructive fraud or misrepresentation. R. App. 64a.

In both *Krumme* and *Allen*, the District Court concluded that Petitioners could recover costs and attorneys' fees from WestPoint under the EPI Amendment.[2] However, the District

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2. The EPI Amendment contains a fee-shifting clause which provides that, "[i]f at any time upon or after a Change of Control there should arise any dispute as to the validity, interpretation or application of any term or condition of this Agreement," WestPoint would pay the EPI participant's reasonable attorneys' fees and expenses "regardless of whether the Executive is the prevailing party." R. App. 70a § 16. Among other things, WestPoint contended below that the instant dispute did not arise "upon or after a Change of Control" because the discount rate was changed on February 16, 1989, the *Allen* plaintiffs released their claims in late February 1989, Krumme sued on March 23, 1989, and a Change in Control did not occur until April 5, 1989.

Court deferred determination of the costs and attorneys' fees payable to Krumme and the *Allen* plaintiffs until after an appeal.

B. The Decision of the Second Circuit

WestPoint appealed from the *Krumme* and *Allen* judgments, among other things challenging the District Court's ruling that the Committee's action to change the discount rate from 5% was ineffective and the District Court's decision to shift attorneys' fees. The *Allen* plaintiffs cross-appealed, seeking reversal of the District Court's rulings on rescission and misrepresentation. The *Allen* and *Krumme* cases were consolidated for appeal in the Second Circuit.

On appeal, WestPoint argued (among other things) that (i) the Committee was empowered to change the discount rate by the express terms of the Cluett Plan; (ii) the discount rate could be changed without an amendment to the Plan; and (iii) the plaintiffs failed to avail themselves of the Cluett Plan's administrative remedies and could not collaterally challenge the Committee's action. In opposition, Krumme and the *Allen* plaintiffs argued (among other things) that the Committee had no authority to change the discount rate, which (they asserted) under Revenue Ruling 79-90 could only be changed by Board amendment to the Cluett Plan.

The Court of Appeals ruled that the Cluett Committee effectively adopted the PBGC-based discount rate; that the EPI Amendment incorporated that rate; and that the executives' lump sums were properly calculated using a 9.3% discount factor. P. App. 24a. The Second Circuit held that the Cluett Plan expressly permitted the Committee to adopt a new discount rate without a plan amendment. P. App. 30a. The Court of Appeals observed that § 9.6 of the Cluett Plan made the Committee's written records "conclusive and binding" on the

Cluett Plan sponsor, the plan participants, and "all other persons having any interest under the Plan." P. App. 31a. Thus, the Committee's minutes evidencing adoption of the PBGC-based rate were a "written instrument" under which the Plan was established or operated, and the resulting 9.3% discount rate was "contained in" the Cluett Plan. *Id.*

Because the District Court had not yet set the amount of fees and costs, the Court of Appeals declined to review the lower court's ruling that Petitioners were nonetheless entitled to recover their attorneys' fees under the EPI Amendment. A proceeding to determine attorneys' fees is expected to commence before a Magistrate Judge. Respondents respectfully suggest that, were it not for the District Court's fee-shifting ruling, this certiorari petition would never have been filed. The instant petition, in short, is an example of the attorneys' fee tail wagging the substantive dog.

SUMMARY OF ARGUMENT

There is no basis for granting a writ of certiorari in this case.

First, this case involves an idiosyncratic pension plan provision, as it was applied after being incorporated by reference into a change-in-control amendment to a non-qualified deferred compensation plan. Control of WestPoint changed more than nine years ago. The dispute thus cannot recur, and has no significance to the public at large.

Second, the petition for certiorari should be denied because Petitioners failed to avail themselves of the administrative remedies available under the Cluett Plan, and are thereby barred from collaterally attacking the Committee's action through a lawsuit.

Third, Petitioners misstate the law when they argue that the Committee's action "violate[d]" 26 U.S.C. § 401(a)(25) and Revenue Ruling 79-90. *See* Petitioners' Questions Presented, Question 1. Those provisions are not legal mandates, but rather are voluntary standards that must be met in order to obtain certain tax benefits. Here, the administrative and regulatory agencies charged with enforcing tax-qualification requirements have not taken any action against WestPoint or the Cluett Plan during the 9½ years since the Committee adopted the PBGC-based discount rate. Further, the PBGC-based discount rate complies with the requirements of Revenue Ruling 79-90.

Fourth, the Second Circuit's decision in no way conflicts with ERISA or with this Court's precedent. The *Krumme* and *Allen* cases did *not* concern pension benefits. Rather, the parties disputed the discount rate applicable to a change-in-control amendment for a "top-hat," non-ERISA-qualified, deferred compensation plan offered only to high-level executives. The EPI Amendment was not subject to ERISA's accrued benefit rules and Petitioners' "accrued" benefits under the Cluett Plan were never affected.

Fifth, there is no conflict among the Circuits because the Second Circuit's decision is fully in accord with the Third and Seventh Circuit opinions cited by Petitioners.

Finally, the writ should be denied because the Second Circuit correctly analyzed and applied the disputed provisions of the Cluett Plan and the EPI Amendment. The Committee was expressly charged with the power to change the discount rate, and was not required to amend the Cluett Plan in order to do so. The rate adjustment was duly recorded in the Committee's minutes which, under the terms of the Cluett Plan, constituted an instrument or document governing that Plan.

REASONS FOR DENYING THE WRIT

I.
THIS CASE INVOLVES AN IDIOSYNCRATIC PLAN PROVISION, AND THE UNDERLYING DISPUTES CANNOT RECUR

The present case does not merit review by this Court because the parties' dispute is fact-specific and lacks broader significance.

First, Petitioners ask this Court to determine whether the Committee validly changed the discount rate in the Cluett Plan. But, as this Court has previously noted, whether a plan sponsor has complied with procedures for changing a plan "depend[s] on a fact-intensive inquiry." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 85 (1995) (remanding similar question on that ground). A petition raising what is "primarily a question of fact . . . does not merit Court review." *National Labor Relations Board v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 177 n.8 (1981) (finding that certiorari was improvidently granted when the main issue was whether the Court of Appeals was correct in determining that a person was not the functional equivalent of a personnel department employee, thereby making the National Labor Relations Act applicable).

Second, the only persons who might be affected by the Second Circuit's decision are former executives of Cluett who participated in the EPI Program and executed the EPI Amendment.[3] All the executives except Krumme either released

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3. As the District Court found, the Cluett Plan's discount rate was used only to calculate *de minimis* lump sum distributions under $3,500. R. App. 21a & n.3. A ruling by this Court is therefore unlikely to have a significant effect on Cluett Plan participants. Further, the record does not reveal any challenge to the discount rate by a Cluett Plan participant *qua* participant.

their claims in 1989 or declined to sue. In particular, the nine *Allen* Petitioners released their claims under the EPI Amendment and accepted WestPoint's payout at the 9.3% PBGC-based rate. The District Court held two trials on whether those releases resulted from mistake or misrepresentation, and in each case found that they did not. The District Court's factual findings in that regard must be upheld unless clearly erroneous.[4] Because the District Judge made her factual rulings while under the impression that the correct discount rate was 5%, *see* R. App. 18a-19a, 37a, reversal of the Second Circuit's contrary determination should not affect the releases' validity.

Thus, Krumme is the only person with a real, non-speculative interest in obtaining reversal of the Second Circuit's decision. The Supreme Court "does [not] sit for the benefit of the particular litigants," and certiorari is inappropriate where the "question [is] of importance merely to the litigants and [does] not present an issue of immediate public significance." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 79 (1955) (internal citation omitted); *accord Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) (when a case involves no issues that are "importan[t] to the public, as distinguished from . . . the parties," certiorari should be denied). Whether Krumme should recover the difference between his lump sum payment discounted at 9.3% and a payment discounted at 5% is not a question that warrants the attention of this Court.

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4. *Amadeo v. Zant*, 486 U.S. 214, 223 (1988) ("It is well settled . . . that a federal appellate court may set aside a trial court's findings of facts only if they are 'clearly erroneous.' ") (citing Fed. R. Civ. P. 52(a)); *accord Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985) (describing "clearly erroneous" standard generally).

II.

PETITIONERS FAILED TO AVAIL THEMSELVES OF ADMINISTRATIVE REMEDIES UNDER THE CLUETT PLAN

Certiorari should not be granted because Petitioners failed to avail themselves of the administrative remedies under the Cluett Plan. Although the Cluett Plan provides a two-step appeal procedure for benefit determinations, *see* R. App. 66a § 9.8, Petitioners made no use of it. Instead of challenging the Committee's action as Cluett Plan participants, they mounted a collateral attack on the discount rate change through two federal lawsuits.

Every Circuit to consider the issue has held that failure to exhaust a plan's administrative remedies bars a lawsuit for additional benefits under ERISA.[5] That rule, along with Petitioners' inaction at the Plan level, makes this matter unsuitable for Supreme Court review.

III.

THE INTERNAL REVENUE CODE AND REVENUE RULING 79-90 WERE NOT VIOLATED

Petitioners' argument that the Committee's adoption of the PBGC-based rate violated 26 U.S.C. § 401(a)(25) and Revenue Ruling 79-90 mischaracterizes the law. Section 401(a)(25) and

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5. *See, e.g., Hall v. National Gypsum Co.*, 105 F.3d 225, 231 (5th Cir. 1997); *Wilczynski v. Lumbermens Mut. Cas. Co.*, 93 F.3d 397, 401-02 (7th Cir. 1996); *Hickey v. Digital Equip. Corp.*, 43 F.3d 941, 945 (4th Cir. 1995); *Communications Workers v. AT&T*, 40 F.3d 426, 431-32 (D.C. Cir. 1994); *Kennedy v. Empire Blue Cross & Blue Shield*, 989 F.2d 588, 594 (2d Cir. 1993); *Alfarone v. Bernie Wolff Constr. Corp.*, 788 F.2d 76, 79 (2d Cir. 1986); *Amato v. Bernard*, 618 F.2d 559, 567 (9th Cir. 1980).

the Revenue Ruling impose no legal mandate. Rather, they simply set voluntary conditions for qualification that, if not met, could potentially result in adverse tax consequences. *See* 29 U.S.C. § 1202 (coordinating various agencies' efforts with respect to application of tax regulations to pension plans).

Failure to comply with Revenue Ruling 79-90 and 26 U.S.C. § 401(a)(25) would thus affect only the Cluett Plan's tax-exempt status. Actuarial assumptions adopted in ways other than those specified in the tax law would still remain valid and effective among the parties.[6] As a result, a decision by this Court construing the tax-qualification requirements for pension plans would not alter the 9.3% discount rate.

Notably, those agencies charged with enforcing the provisions cited by Petitioners have expressed no concern over the Committee's adjustment of the discount rate. The record reveals no proceeding against the Committee, the Cluett Pension

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6. *See Reklau v. Merchants Nat'l Corp.*, 808 F.2d 628, 631 (7th Cir. 1986) (provisions of Internal Revenue Code § 401 "relate solely to the criteria for tax qualification under the Internal Revenue Code" and are not imposed on pension plans by ERISA) (citation omitted); *accord Huber v. Casablanca Indus., Inc.*, 916 F.2d 85, 106 (3d Cir. 1990) (amendments to plan were valid even though employer's annual reports to Department of Labor indicated that no amendments had been adopted; "[w]hatever the consequences that may flow in other forums from the Trustees' failure to have reported those amendments, that failure cannot be found to invalidate the plan amendments"), *cert. dismissed*, 506 U.S. 1088 (1993), *overruled in part on other grounds by Milwaukee Brewery Workers Pens. Plan v. Jos. Schlitz Brewing Co.*, 513 U.S. 414 (1995); *Chemtech Inds., Inc. v. Goldman Financial Group Inc.*, 156 F.R.D. 181, 184 (E.D. Mo. 1994) (in dismissing ERISA claim against defendants, court noted that § 401 of the Internal Revenue Code relied upon by plaintiffs "ha[s] not been imposed on employee benefit plans by the substantive terms of ERISA"); *Cooke v. Lynn Sand & Stone Co.*, 673 F. Supp. 14, 21 n.8, 22-23 (D. Mass. 1986) (Revenue Ruling 79-90 "was incorporated into the Internal Revenue Code, but not ERISA").

Plan, or WestPoint by the Internal Revenue Service, the Department of Labor, the Pension Benefit Guaranty Corporation, or any other organization charged with responsibility for such matters during the 9½ years since the PBGC-based discount rate was adopted.

In any event, Revenue Ruling 79-90 itself states that it can be satisfied by "a variable standard which provides for self-adjusting changes which are independent of employer discretion," for example, a provision "specifying that the interest rate will be a designated percentage of the prime interest rate of a specified bank or banks at the time of the benefit determination." The floating, self-adjusting, PBGC-based discount rate adopted by the Committee is precisely that type of standard.

IV.

THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH ERISA OR WITH THIS COURT'S PRECEDENT

The Second Circuit's decision does not conflict with this Court's precedent, nor does it "make a shambles" of ERISA's scheme for protecting accrued pension benefits (Pet. 12). In fact, the decision below does not affect accrued pension benefits at all.

A. The Second Circuit's Opinion Does Not Conflict With 29 U.S.C. § 1054(g)

Under 29 U.S.C. § 1054(g), "[t]he accrued benefit of a participant plan may not be decreased by an amendment of the plan." Although relied upon by Petitioners, that section of ERISA does not apply to this case.

First, Petitioners did not sue for their pension benefits under the Cluett Plan. Rather, they attacked the Committee's action collaterally in a lawsuit to obtain a higher payout under the EPI Amendment, a *non*-ERISA-qualified "top-hat" deferred compensation plan. A "top-hat" plan is

> a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees.

29 U.S.C. §§ 1051(2), 1101(a)(1). The EPI Program was a top-hat plan: its future stream of payments was "Deferred Compensation"; it was unfunded; and the EPI participants were all senior executives of Cluett. R. App. 17a; 68a.

ERISA exempts top-hat plans from most of the requirements ordinarily applicable to employee benefit plans, including the prohibition on cutbacks in accrued benefits in 29 U.S.C. § 1054(g) and the requirements concerning authority to amend the plan in 29 U.S.C. § 1102(b)(3) — the two provisions that Petitioners assert were violated by the Committee's action. *See* 29 U.S.C. §§ 1101(a)(1), 1051(2).

Second, there were no "accrued" benefits under the EPI Amendment to be reduced. No lump-sum payout was due under the EPI Amendment until "the occurrence of a Change in Control." R. App. 69a-70a, ¶4A(2). The Committee changed the discount rate on February 16, 1989. P. App. 9a-10a. The District Court found as a fact that the Change in Control did not occur until April 5, 1989, and no party appealed that decision. R. App. 2a. Thus, no right to a lump sum at a particular discount rate had accrued under the EPI Amendment at the time the discount rate was changed.[7]

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7. EPI participants who did not wish to take a lump sum discounted at 9.3% could retain the full, future stream of payments previously available under the EPI Program, thus losing nothing. R. App. 75a-76a.

Third, the discount rate was *not* changed by amendment. Instead, it was changed by a Committee action that, rather than amending the Plan, exercised an existing grant of authority to adopt a new discount factor *without* amendment. P. App. 30a-31a. The prohibition of 29 U.S.C. § 1054(g), in contrast, "is specifically limited to *actual amendments.*" *Stewart v. National Shopmen Pension Fund*, 730 F.2d 1552, 1563 (D.C. Cir. 1984) (emphasis in original), *cert. denied*, 469 U.S. 834 (1984). Applying the provision to actions other than plan amendments "would require [courts] to ignore" the statute's plain language. *Id.*[8]

Fourth, the administrators of the Cluett Plan did not implement the changed discount rate so as to reduce anyone's accrued pension benefits. Rather, they used a "split" rate, applying the 5% factor to benefits accrued before February 16, 1989 and the PBGC-based rate to benefits accrued afterward. R. App. 77a-78a. The "split" discount rate, however, applied *only* to the Cluett Plan, under which some benefits had vested before February 16, 1989 — it did *not* apply to the EPI Amendment, since EPI participants were not entitled to a lump sum unless and until a Change in Control had occurred.

B. The Second Circuit's Opinion Does Not Conflict With *Curtiss-Wright*

There is no conflict between the Second Circuit's opinion and this Court's statements in *Curtiss-Wright Corporation v. Schoonejongen*, 514 U.S. 73 (1995), to the effect that employee benefit plans must be established and maintained pursuant to a written instrument. The Cluett Plan *was* a written document. It

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8. *Accord Oster v. Barco of California Employees' Retirement Plan*, 869 F.2d 1215, 1220-21 (9th Cir. 1988); *Dooley v. American Airlines Inc.*, 797 F.2d 1447, 1450-52 (7th Cir. 1986), *cert. denied*, 479 U.S. 1032, 1087 (1987); *IAM Ownership Investment Trust Fund v. Eastern Air Lines, Inc.*, 639 F. Supp. 1027, 1034 (D. Del. 1986).

also incorporated by reference *other* written documents — namely, the Committee's decisions and records — and provided in § 9.6 that those decisions and records "shall be conclusive and binding" upon the plan sponsor, participants, and any other person having an interest under the Cluett Plan. R. App. 65a-66a § 9.6. Together, the Cluett Plan, the Committee minutes and other governing documents constituted the "written instrument" under which the Cluett Plan was "established and maintained." *See* 29 U.S.C. § 1102(a)(1).

Petitioners cannot seriously contend that an ERISA plan must be a *single* document. *Curtiss-Wright* indicates the contrary. The *Curtiss-Wright* Court used the plural form when explaining that the purpose of ERISA's written document requirement is to allow an employee "*on examining the plan documents*, [to] determine exactly what his rights and obligations are under the plan." *Curtiss-Wright*, 514 U.S. at 83 (quoting ERISA legislative history) (emphasis in quoted material). The Court in *Curtiss-Wright* went on to describe Summary Plan Descriptions, plan amendment summaries, and other "governing plan *documents*" that must be made available to plan participants. *Accord* 29 U.S.C. § 1104(a)(1)(D) (requiring that fiduciaries generally act "in accordance with the *documents* and *instruments* governing the plan"). Lower federal courts agree that ERISA plans may include more than one document.[9]

9. *See, e.g., Rinard v. Eastern Co.*, 978 F.2d 265, 268 n.2 (6th Cir. 1992) (ERISA does not require that a plan be a single document), *cert. denied*, 507 U.S. 1029 (1993); *Bright v. SKW Alloys Group Ins. Plan*, 823 F. Supp. 428, 431 (W.D. Ky. 1993) ("ERISA does not require the terms of an ERISA plan to be contained in a single document"); *Eardman v. Bethlehem Steel Corp. Employee Welfare Benefit Plans*, 607 F. Supp. 196, 207 (W.D.N.Y. 1985) ("an employee benefit plan under ERISA can be comprised of more than one document"); *Myron v. Trust Co. Bank Long Term Disability Benefit Plan*, 522 F. Supp. 511, 519 (N.D. Ga. 1981) (finding "no authority that states that this written instrument [establishing an employee benefit plan, as referenced in 29 U.S.C. § 1102(a)(1)] must be one all-inclusive document"), *aff'd mem.*, 691 F.2d 510 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983).

Because the Committee minutes were conclusive and binding under the terms of the Cluett Plan, the Second Circuit properly accorded them the status "plan documents" and held that no amendment was necessary for the Committee to adopt the PBGC-based floating rate. *See infra* Point VI.

C. The Second Circuit's Opinion Does Not Undermine The Distinction Between An Employer As Fiduciary And An Employer As Plan Amender

Petitioners' attempts to make the "distinction between discretionary management or administrative action and plan design or amendment" (Pet. 12) relevant to the present case are unavailing. While employers do not act as fiduciaries in amending their plans,[10] in this case, the change in the discount rate was not an amendment. To the extent that the Committee's decision was subject to ERISA's fiduciary duties, the Committee fulfilled those duties by acting on the considered advice of the plan actuary, R. App. 72a-73a, and Petitioners abandoned their claim for breach of fiduciary duty on appeal. P. App. 21a n.13. To the extent that the Committee's decision is viewed as a discretionary act of management, the alternative mechanism urged by Petitioners — amendment of the Cluett Plan by WestPoint's Board — would entail far greater management discretion, unconstrained by any requirement of a recommendation from the Cluett Plan's outside actuary.

V.

THERE IS NO CONFLICT AMONG THE CIRCUITS

Petitioners attempt to manufacture a conflict among the circuits where none exists.

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10. *See, e.g., Lockheed Corporation v. Spink*, 517 U.S. 882, 890-91 (1996); *Varity Corp. v. Howe*, 516 U.S. 489, 505 (1996).

A. The Second Circuit's Decision Does Not Conflict With *Dooley v. American Airlines, Inc.*

The Second Circuit *followed* the holding in *Dooley v. American Airlines, Inc.*, 797 F.2d 1447, 1451-52 (7th Cir. 1986), *cert. denied*, 479 U.S. 1032, 1087 (1987), that exercising or applying a provision of the plan does not equal an "amendment" to the plan under ERISA. P. App. 29a-30a. That holding does not give rise to a conflict; indeed, the Second Circuit cited four other federal decisions in accord. P. App. 30a.

Further, the Second Circuit's decision does not conflict with *Dooley*'s statement that American Airlines' plan was not in compliance with Revenue Ruling 79-90. The Cluett Plan is different because it expressly provided that "decisions and . . . records of the Committee shall be *conclusive and binding* upon the Company, Participants, and all other persons having any interest under the Plan." R. App. 65a-66a § 9.6. The Second Circuit properly held that this language gave duly-adopted minutes of the Committee the status of "plan documents" under ERISA. P. App. 31a.

The *Dooley* plan apparently contained no analogous clause, and the *Dooley* court *declined to rule* on the circumstances under which American Airlines' informal bulletins changing the discount rate could constitute plan documents. *Dooley*, 797 F.2d at 1451 n.6 ("The parties have briefed and argued whether the actuarial assumptions — contained, as they were, in bulletins which were physically distinct from the pension plan document — can be construed as part of the pension plan for purposes of ERISA. Because of our disposition of this case, we need not reach that question.").

B. The Second Circuit's Decision Does Not Conflict With *Frank v. Colt Industries, Inc.*

The other putative conflict raised by Petitioners should not even be addressed by this Court because it involves *Frank v. Colt Industries, Inc.*, 910 F.2d 90 (3d Cir. 1990), a case not cited in any of Petitioners' briefs in the Second Circuit, including their motion for reargument.

First, the Supreme Court's "normal practice . . . is to refrain from addressing issues not raised in the Court of Appeals." *Equal Employment Opportunity Commission v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986) (writ of certiorari dismissed).[11] This case presents no ground for departing from that practice.

Second, the Second Circuit's opinion is fully consistent with *Frank*. In *Frank*, the Third Circuit held that, "[w]here an employer has created an integrated document" setting forth the terms of a benefit plan, "not every internal document containing a reference to management's interpretation of the plan should be regarded as a part of the plan itself." *Id.* at 98. As the Third Circuit's language suggests, *some* documents extrinsic to the written plan *may* form a part of the plan for ERISA purposes. The Court of Appeals below properly recognized that the Cluett Committee minutes constituted such a document, because the Cluett Plan referenced the Committee's documents and records and conferred upon them "*conclusive and binding*" status. P. App. 31a; R. App. 66a § 9.6. As is apparent from § 9.6's

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11. *Accord City of Springfield, Massachusetts v. Kibbe*, 480 U.S. 257, 259 (1987) (the Supreme Court "ordinarily will not decide questions not raised or litigated in the lower courts.") (writ of certiorari dismissed); *Rogers v. Lodge*, 458 U.S. 613, 628 n.10 (1982) (the Supreme Court refused to address "contention [that] was not properly raised in the Court of Appeals and was not addressed by that court.").

incorporation of extrinsic documents, the Cluett Plan was *not* an "integrated document" of the sort discussed in *Frank*. Indeed, the Cluett Plan contained no integration clause.

VI.

THE DECISION BELOW WAS CORRECT

A. The Committee Acted Under Its Express Authority To Change The Discount Rate

Petitioners have ignored the effect of § 9.6 of the Cluett Plan, which expressly conferred upon the Committee the power to adopt new actuarial assumptions. That section bears quoting in full:

> Authority and duties of the Committee:
>
> The Committee shall from time to t[i]me establish rules for the administration of the Plan and the transaction of its business. Except as herein otherwise expressly provided, the Committee shall have *the exclusive right* to interpret the Plan and *to decide any matters arising thereunder* in connection with the administration of the Plan. It shall endeavor to act by general rules so as not to discriminate in favor of any person. *Its decisions and the records of the Committee shall be conclusive and binding upon the Company, Participants, and all other persons having any interest under the Plan.*
>
> *The Committee shall adopt from time to time actuarial tables to be used as the basis for all actuarial calculations and shall determine from time to time the percentum rate or rates of interest to be used as the basis for calculations required in*

> *connection with the Plan*. As an aid to the Committee, the Actuary appointed by the Committee shall make annual actuarial valuations of the assets and liabilities of the Plan and shall certify to the Committee the tables and rate or rates of interest which he would recommend for use by the Committee. The Committee shall receive and review the periodic valuation of the Plan made by the Actuary.

R. App. 65a-66a § 9.6.

Similarly, § 1.3 of the Cluett Plan specifically provided for the actuarial factors to be set by the Committee:

> "Actuarial Equivalent" means an amount of equal value when computed on the basis of interest, mortality and other tables *as shall be adopted from time to time by the Committee on the advice of the Actuary*, the current factors being as specified below: . . . .

R. App. 65a § 1.3. Therefore, Section 1.3 of the Cluett Plan did not freeze the discount rate at 5%. Rather, it recited that 5% was among the Plan's "current" actuarial assumptions, and set forth a mechanism for the Committee to change those assumptions.

The Committee properly executed its powers under sections 1.3 and 9.6 when it changed the discount rate on February 16, 1989. The Committee received a written recommendation from the Actuary, implemented the Actuary's advice, and formally recorded its action in written minutes. R. App. 24a-25a, 72a-73a, 74a. Therefore, the discount rate was effectively changed and the PBGC-based rate was incorporated by reference into the EPI Amendment.

B. The Committee's Action Did Not Violate ERISA

The provisions of ERISA relied upon by Petitioners require that employee benefit plans: (i) be established and maintained pursuant to written instruments, 29 U.S.C. § 1102(a)(1); (ii) specify the basis on which payments are made to and from the plan, 29 U.S.C. § 1102(b)(4); and (iii) provide a procedure for amending the plan and identify the persons with authority to amend the plan, 29 U.S.C. § 1102(b)(3).

WestPoint did not violate any of those provisions: the Committee's February 16, 1989 action was taken pursuant to express provisions of the Cluett Plan, and was memorialized in the Committee's minutes. Under § 9.6 of the Cluett Plan, those minutes were a "conclusive and binding" plan document. *Accord Ravenscraft v. Hy-Vee Empl. Benefit Plan*, 85 F.3d 398, 401 (8th Cir. 1996) (plan's trust agreement conferred status of "Plan Document" on separate schedule of benefits); *see also Board of Trustees v. Weinstein*, 107 F.3d 139, 145-46 (2d Cir. 1997) (actuarial reports were not "instruments" under ERISA's the disclosure provision because they were not "governing documents" under which plan was established or operated). The adoption of the PBGC-based rate in a plan document or instrument rendered use of the Cluett Plan's written amendment procedure unnecessary.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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November 6, 1998

APPENDIX

APPENDIX A — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JANUARY 2, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

90 CIV. 3841 (SAS)
89 CIV. 2016 (SAS)

GORDON E. ALLEN, JOHN CURRIER, JAMES J. DUNNE, LEO FORNERO, GERARD P. MANDRY, NORMAN K. MATHESON, BRUCE E. MOORE, NICHOLAS PALLOTA and COCHRAN B. SUPPLEE,

Plaintiffs,

-against-

WESTPOINT-PEPPERELL, INC., D. MICHAEL ROARK, C. POWERS DORSETT and BARRY F. SHEA,

Defendants.

ROBERT D. KRUMME,

Plaintiff,

-against-

WESTPOINT-PEPPERELL, INC.,

Defendant.

MEMORANDUM OPINION

Appendix A

SHIRA A. SCHEINDLIN, U.S.D.J.:

This opinion addresses the question: when did a "Change in Control" of WestPoint-Pepperell, Inc. ("WestPoint") occur, as that term is used in a document known as the "EPI Amendment." A two day bench trial was held on this question. For the reasons set forth below, I conclude that a "Change in Control" occurred on April 5, 1989.[1]

A. Factual Background

In 1975, Cluett Peabody & Co. ("Cluett"), which was acquired by Defendant WestPoint in 1986, established an employee benefit program for its senior executives known as the Executive Permanent Insurance Program ("EPI Program"). This program consists of certain retirement and life and health insurance benefits, including a deferred compensation agreement which provides supplemental pension benefits. Plaintiffs are participants in the EPI program and are parties to a deferred compensation agreement under that program.

On July 29, 1987, the WestPoint Board of Directors approved various amendments to its employee benefit plans that accelerated the payment of benefits in the event a "Change in Control" of WestPoint occurred. On the next day, the Cluett Board of Directors, which was comprised of members of WestPoint's management, approved an EPI amendment with a

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1. Familiarity with the many prior opinions in this case is assumed. *See Allen v. WestPoint-Pepperell, Inc.*, 945 F.2d 40 (2d Cir. 1991); *Allen v. West Point-Pepperell, Inc.*, 1995 WL 649929 (S.D.N.Y. Nov. 2, 1995); *Allen v. WestPoint-Pepperell, Inc.*, 1991 WL 8505 (S.D.N.Y. Jan. 29, 1991), *rev'd*, 945 F.2d 40 (2d Cir. 1991).

Appendix A

"Change in Control" definition identical to the WestPoint amendments.[2]

As approved in 1987, the "Change in Control" provisions provided that a "Change in Control" would occur if a person or group of persons became the "Beneficial Owner" of 30% of WestPoint's stock, "unless a majority of the continuing Directors of the Board determines in their sole discretion that, for purposes of the Plan, a Change in Control has not occurred." Thus, under this language, the Board retained discretion to declare that a "Change in Control" did not occur.

Although the "Change in Control" amendment to the EPI plan was approved in July 1987, it was not implemented until November 1988. By that time, pursuant to the advice of outside counsel, the provision had been changed in two respects. First, the percentage of stock that was needed to trigger a "Change in Control" was reduced from 30% to 20%. Second, the Board's discretion to declare that a "Change in Control" had not occurred was eliminated. This last change was apparently made because of concerns that a third party might condition a tender offer on the Board finding no "Change in Control," thereby forcing the Board to choose between money for its shareholders and the protection of its employees. *See* Def. Trial Ex. U.

As noted, under the EPI Amendment implemented on November 11, 1988, a "Change in Control" occurs if a person or group of persons becomes the "Beneficial Owner" of 20% or more of WestPoint's stock. Subsection (f) of Section 4A(1) of the Amendment defines the term "Beneficial Owner":

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2. This acceleration would result in the payment of a single lump sum benefits rather than future monthly payments.

> by reference to Rule 13d-3 under the Act as such Rule is in effect on June 24, 1987, provided, however, that any individual, corporation, partnership, group, association, or other person or entity which has the right to acquire any of WestPoint's outstanding securities entitled to vote generally in the election of directors at any time in the future, *whether such right is contingent or absolute*, pursuant to any agreement, arrangement, or understanding or upon exercise of conversion rights, warrants or options, or otherwise, shall be deemed the Beneficial Owner of such securities.

Joint Exhibit 18 ¶ 4A(l)(f) (emphasis added).

On October 24, 1988, Farley, Inc. and its subsidiaries ("Farley") initiated a hostile tender offer for all of the shares of WestPoint. For several months, WestPoint vigorously contested Farley's takeover attempt, and, in early February 1989, decided to "auction" the company to the highest bidder. On February 23, 1989, after Farley submitted the highest bid, WestPoint entered into a merger agreement with Farley. On April 5, 1989, Farley purchased approximately 95% of WestPoint's stock pursuant to its tender offer. On that same day, pursuant to the EPI Amendment, WestPoint sent each of the *Allen* plaintiffs a lump sum payment.

At trial, Plaintiffs argued that a "Change in Control" occurred under the EPI Amendment long before April 5, 1989, the date on which Farley actually purchased the bulk of WestPoint's stock. Plaintiffs note that, under the EPI Amendment, one is considered the "Beneficial Owner" of any stock one has the "right to acquire," even where this right is

"contingent." Plaintiffs argue that, prior to April 5, Farley had a contingent right to acquire any stock that had been tendered to it. Accordingly, Plaintiffs contend that a "Change in Control" occurred under the EPI Amendment by November 21, 1988, when the stock Farley owned, combined with the shares that had been tendered to it, exceeded 20%.[3]

Defendants argue that Plaintiffs' interpretation of the "Change in Control" provision is contrary both to the language of the Amendment and to the intent of the Board in creating this provision. Moreover, they assert that Plaintiffs' interpretation should be avoided because it would create the absurd result of a "Change in Control" clause which does not fulfill any of the functions associated with such provisions.

B. The Plain Language

In interpreting a contract, the Court strives to effectuate the intent of the contracting parties "as revealed by the language they chose to use." *Seiden Assocs. v. ANC Holdings, Inc.*, 959 F.2d 425, 428 (2d Cir. 1992). Where the contract's language is unambiguous, " 'its meaning must be determined from the four corners of the instrument without resort to extrinsic evidence of any nature.' " *Goodheart Clothing Co. v. Laura Goodman Enterprises, Inc.*, 962 F.2d 268, 272 (2d Cir. 1992) (quoting John D. Calamari & Joseph M. Perillo, *Contracts* 166-67 (3d ed. 1987)).

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3. Alternatively, Plaintiffs contend that the execution of a Merger Agreement, which Farley and WestPoint entered into on February 23, 1989, triggered the "Change in Control" provision. Plaintiffs note that the Agreement gave Farley the right to acquire all remaining shares of the company once a majority of the shares were tendered to him. Thus, they argue that the Agreement gave Farley the "contingent" right to acquire up to 49% of WestPoint's shares.

In the case at hand, each party has offered an initially plausible interpretation of the EPI Amendment's text. As noted, Plaintiffs contend that, under the Amendment's language, Farley became a "beneficial owner" of more than 20% of WestPoint's stock because it had a "contingent" right to purchase stock that was tendered to it in November. Under Plaintiffs' theory, Farley's right was "contingent" on the shareholders not withdrawing the stock they had tendered, which they had the right to do until April 5, 1989. Trial Transcript ("Tr.") at 379-80.[4]

Defendants argue that Plaintiffs' interpretation of the word "contingent" is too expansive, and eviscerates the significance of the phrase "right to acquire." Defendants note that the word "right" "connotes an ascertainable and legally enforceable power." *United States v. Byrum*, 408 U.S. 125, 136, 92 S. Ct. 2382, 2390 (1970). They contend that, because the shareholders had the power to withdraw their tendered shares at all times, Farley never had any legally enforceable right to purchase them.[5]

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4. Plaintiffs note that Farley's October, 1988 Letter of Transmittal to WestPoint's shareholders provides that tender of the shares will constitute a "binding agreement." *See* Plaintiffs' Trial Ex. 83. This language had no affect, however, on the tendering shareholders' absolute right to withdraw the tender of their stock at any time prior to the expiration of the offer. Indeed, earlier in the sentence quoted by plaintiffs, the letter states that the tender is "subject to the conditions of the Offer. . . .

5. Plaintiffs respond by citing a number of cases that stand for the proposition that one party's "restricted option to terminate" an agreement does not destroy the validity of the agreement. *See, e.g., Dorman v. Cohen*, 413 N.Y.S.2d. 377, 382 (1st Dep't 1979); *Satenstein v. Satenstein*, 248 N.Y.S.2d. 281 (Sup. Ct. N.Y. Co. 1963), *aff'd*, 247 N.Y.S.2d 380

(Cont'd)

Defendants also emphasize that the first part of the definition of "Beneficial Owner" refers to SEC Rule 13d-3. They argue that the term "right to acquire," as used in that Rule, refers to contractual, or legally enforceable, rights. *See* Testimony of Defendants' Expert Witness, Professor Bernard Black, Tr. at 329. They note that under Rule 13d-3 there are situations in which one may be the "Beneficial Owner" of stock one has a contingent contractual right to purchase. *See, e.g., Newmark v. RKO General*, 425 F.2d 348, 356 (2d Cir.), *cert. denied*, 400 U.S. 854, 91 S. Ct. 64 (1970) (finding defendant to be beneficial owner where it contracted to purchase stock contingent on regulatory board's approval).[6] Defendants

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(Cont'd)
(1st Dep't 1964). In the instant action, however, the shareholders' right to withdraw their shares was absolute. As long as they acted before the expiration of their withdrawal rights, the shareholders were free to withdraw at will. They did not have to give *prior* notice to Farley, but merely had to fill out a simple form, and deliver it to a location specified in the tender offer documents. Tr. at 380. Accordingly, they had no legally enforceable obligation. *See Dorman*, 413 N.Y.S.2d at 382-83. Because the shareholders option to withdraw went "so far as to render illusory the promise of the party having the option, there is indeed no consideration, and therefore no contract." 3 Williston § 7:14 (4th ed. 1992).

There is another reason the cases cited by Plaintiffs are distinguishable. Those cases involve a party's right to terminate an existing and ongoing contract, to halt performance that has already been partially completed. Here, the shareholders were empowered to withdraw their shares before either party had initiated performance. Moreover, because there was a possibility that the tender offer would fail, it was feasible that, even absent withdrawal, neither party would ever be required to perform.

6. Although *Newmark* involved Section 16(b) of the Securities Exchange Act, because the definition of "Beneficial Owner" is even broader under Rule 13d-3, the case has precedential value in interpreting that Rule.

acknowledge that the addition of the word "contingent" in the EPI Amendment must encompass something broader than provided for in the Rule. Tr. at 372-73. However, they contend that it cannot be read to embrace the mere tendering of shares by persons retaining the power of withdrawal, which creates no contractual rights.

The Court finds that each party has offered a textually plausible interpretation, and that the EPI Amendment's language is ambiguous. Ambiguity exists where a contract's language is:

> capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.

Walk-In Medical Centers, Inc. v. Breur Capital Corp., 818 F.2d 260, 263 (2d Cir. 1987) (quotation omitted). Here, each party's interpretation finds some support in the text, and is buttressed by credible expert testimony. Moreover, the Second Circuit has previously expressed its view that this language is ambiguous. *See Allen v. WestPoint-Pepperell, Inc.*, 945 F.2d 40, 46 (2d Cir. 1991) (noting that determining the "Change in Control" date in this case presents a question of fact).

C. Intent

Where a contract's language is ambiguous, a court may look to extrinsic evidence of the parties' intent to construe its meaning. *See Hudson-Port Ewen Assocs. v. Chien Kuo*, 78

N.Y.2d 944, 945, 573 N.Y.S.2d 637 (1991). At trial, Defendants offered evidence aimed at demonstrating that WestPoint did not intend to create a "Change in Control" provision that could be triggered by the mere tendering of shares. Although the Court finds that this evidence was not dispositive, it did tend to support the Defendants' position.

For example, Defendants produced a letter dated June 19, 1987 from C. Powers Dorsett, WestPoint's Secretary and General Counsel, to the members of the Compensation Committee of WestPoint's Board. In the letter, Mr. Dorsett, who reviewed the existing employee benefit plans at the Board's behest, recommends some changes. *See* Def. Trial Ex. JJ. Addressing the concept of a "Change in Control," Mr. Dorsett wrote that it could be defined as "the *acquisition* by someone of a stated percentage of the Company's stock." *Id.* (emphasis added). Nowhere in this letter, which is dated a month prior to the Board's approval of the "Change in Control" language, did Mr. Dorsett mention anything approximating the definition of "Change in Control" advocated by the Plaintiffs here.

Indeed, after years of discovery, the Plaintiffs were not able to produce any evidence that anyone associated with, or consulted by, WestPoint believed that the "Change in Control" provision they were adopting could be triggered by the tendering of shares. Ordinarily, the Court would accord little significance to this absence of any evidence of intent. However, the evidence at trial revealed that nobody involved in this case, not even Plaintiffs' own expert, had ever previously seen a "Change in Control" provision that could be triggered by the tendering of shares. Tr. at 423. If WestPoint intended to adopt such an unprecedented provision, it is likely that some documentary or testimonial evidence would exist to this effect.

In addition, WestPoint's conduct after the adoption of the "Change in Control" language is at odds with Plaintiffs' interpretation. Conduct subsequent to the date of the contract is relevant in discerning WestPoint's intent. *See Granite Computer Leasing Corp. v. Travellers Indemnity Co.*, 1987 WL 8647, *3 (S.D.N.Y. Apr. 1, 1987) (relevant extrinsic evidence includes "the parties' own practical interpretation of the contract, manifested by their conduct subsequent to the contract's formation . . . before it became the subject of litigation"). WestPoint waited until April 5, 1989, the date Farley actually acquired more than 20% of its stock, to make any payouts. As Professor Black, Defendants' expert noted, there is no evidence that any members of the Board concluded in November: "the change of control provisions have been triggered, let's write large checks to ourselves." Tr. at 346. In fact, the transmittal letter the company sent to EPI Plan participants in November 1988, alerting them to the adoption of the EPI Amendment, does not mention Farley's existing tender offer, much less the possibility that the tender offer may have already caused the "Change in Control" provision to be triggered.

D. Context and Purpose

Although the evidence of intent weighs in favor of Defendants' interpretation, this limited evidence does not dispose of the issue before the Court. It is therefore necessary to examine the context of the formation of the contract, and the purpose it was intended to serve. *See Genet v. Delaware & Hudson Canal Co.*, 163 N.Y. 173, 179 (1900). Such an examination reveals that Defendants' interpretation is preferable to that offered by Plaintiffs.

Appendix A

The testimony at trial revealed that there are two principal purposes (other than deterring potential raiders) for putting a "Change in Control" provision in an employee benefit plan. The first is to assure employees that they will be paid in the event of a takeover by depriving a raider of the power to prevent payment. Tr. at 416, 426. The second is to insure that key employees will be able to focus on their jobs during the hectic period associated with a potential takeover, rather than having to worry about how they will pay their bills if they lose their jobs. Tr. at 416.

Plaintiffs' interpretation makes little sense in light of these purposes. Arguably, the first purpose is served by either interpretation of the clause. However, it makes much more sense to pay large sums to employees after control has actually changed, rather than before, when the takeover plan may still fail.[7] Paying out large sums during a takeover battle could drain a company of cash during a time when money is particularly tight. Indeed, Defendants' expert testified that such an early payout could violate the Board's fiduciary duty to act in the best interests of the shareholders. Tr. at 359.[8] Moreover, the

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7. Obviously, tender offers are not always successful. In such instances, it would make little sense for a company to have prematurely made lump sum payouts to its employees. Indeed, one purpose of deferred compensation is to delay payment to employees until they have retired, when they will presumably be in a lower tax bracket. In the context of a failed tender offer, premature payouts would unnecessarily defeat this purpose.

8. One of the benefit plans protected employees from dismissal for two years after a "Change in Control" occurred. An early payout would be particularly senseless under this plan. Such a payout would prematurely trigger this provision, and provide a smaller window of protection once a tender offeror assumed actual control. Tr. at 430-32.

second purpose would be completely thwarted by giving effect to Plaintiffs' interpretation. By paying out lump sums to its executives while a takeover battle is still being waged, a company would encourage its key employees to retire at the time they are most needed.

Additionally, because the Amendment provided that WestPoint had to make payments upon a "Change in Control," it was vital that WestPoint be able to discern when such a change occurred. Yet, under the interpretation urged by Plaintiffs, there is no reason WestPoint would know exactly when enough shares had been tendered to Farley to trigger the "Change in Control." The securities laws only require a tender offeror to disclose how many shares have been tendered to it on the date the shareholders' right to withdraw expires. They do not require such disclosure on a day to day basis. Tr. at 343. Hence, under Plaintiffs' interpretation, WestPoint could not have known precisely when it was obligated to make payouts to its employees.

There are other reasons Plaintiffs' interpretation does not make sense when viewed with regard to the overall context and purpose behind the "Change in Control" provision. The "Change in Control" provision was only one of WestPoint's anti-takeover devices. The company had also adopted a "poison pill" provision, which used standard language drafted by lawyers at Wachtell, Lipton, Rosen & Katz. This provision explicitly stated that it could not be triggered by the mere tendering of shares to a tender offeror. As Defendants' expert, Professor Black, pointed out, one would expect these anti-takeover devices to work together, rather than to be triggered at completely different times. Tr. at 358.

Plaintiffs' interpretation would give the term "Beneficial Owner" a meaning at odds with common sense, and with the purpose and context behind the "Change in Control" provision. Linguistically, it seems odd to say that Farley was the "Beneficial Owner" of shares in which he had no economic interest, shares that could be withdrawn by their actual owners any time before April 5, 1989. Because such an awkward interpretation also conflicts with the purpose behind a "Change in Control" provision, it should be avoided. Given this context, it makes no sense to say that Farley had a "contingent" right to purchase the stock which it had been tendered.

Certainly, the word "contingent" in the EPI Amendment must have some significance. However, it cannot be read to embrace the possibility of tendering shareholders withdrawing their stock before it could be purchased. Such a putative "contingency" is different in kind from the contingencies recognized under Rule 13d-3, and incompatible with the notion of a "right to acquire." The contingencies embraced by Rule 13d-3 involve occurrences beyond either party's complete control, in situations in which there is a legally enforceable contract between the parties. *See Newmark*, 425 F.2d at 356 (right to acquire stock contingent on regulatory approval); *In re Coca Cola Bottling Company*, Exchange Act Release No. 13655, 12 SEC Docket 927, 1977 SEC LEXIS 1469 (June 21, 1977) (Coca Cola's right to purchase shares contingent on its not reaching merger agreement with third party). Here, the shareholders had complete control over the alleged "contingency," and Farley never had any legal right to their tendered stock.

A contract should be construed in light of its objective, and should not be read in a fashion that defeats its purpose. *See*

Appendix A

Cromwell Towers Redev. Co. v. City of Yonkers, 41 N.Y.2d 1, 6 (1976). Defendants' interpretation, that a "Change in Control" occurred on April 5, 1989, when Farley had actual control of over 20% of WestPoint's stock, adheres to this purpose. Plaintiffs' view is rejected as it conflicts with the purpose of a "Change in Control" provision and would bring about an absurd result.[9] *See Westbury Post Ave. Assoc. v. Great Atlantic & Pacific Tea Company, Inc.*, 361 N.Y.S.2d 377 (1st Dep't 1974). The Court therefore holds that a "Change in Control," as used in the EPI Amendment, occurred on April 5, 1989.

SO ORDERED:

Shira A. Scheindlin
U.S.D.J.

Dated: New York, New York
January 2, 1996

9. The Court also rejects Plaintiffs' alternative argument that the Merger Agreement triggered a "Change in Control" on February 23, 1989. The execution of the Agreement certainly increased the likelihood that Farley would acquire 20% of WestPoint's shares. However, it did not in any way diminish the shareholders' right to withdraw the shares they had tendered. Tr. at 367. Accordingly, the Merger Agreement did not trigger a "Change in Control."

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MAY 13, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

90 Civ. 3841 (SAS)
89 Civ. 2016 (SAS)

GORDON E. ALLEN, JOHN CURRIER, JAMES J. DUNNE, LEO FORNERO, GERARD P. MANDRY, NORMAN K. MATHESON, BRUCE E. MOORE, NICHOLAS PALLOTA and COCHRAN B. SUPPLEE,

Plaintiffs,

-against-

WESTPOINT-PEPPERELL, INC., D. MICHAEL ROARK, C. POWERS DORSETT and BARRY F. SHEA,

Defendants.

ROBERT D. KRUMME,

Plaintiff,

-against-

WESTPOINT-PEPPERELL, INC.,

Defendant.

OPINION AND ORDER

Appendix B

SHIRA A. SCHEINDLIN, U.S.D.J.:

This opinion addresses two issues vital to the resolution of these actions: (1) whether the releases executed in connection with the *Allen* Plaintiffs' lump sum payouts under the EPI Amendment should be rescinded, and (2) whether Plaintiffs are entitled to have their attorneys' fees paid by Defendant West Point-Pepperell, Inc. The Court held a bench trial from January 3 to January 9, 1996 on these issues. The Findings of Fact and Conclusions of Law set forth below are based on this trial and a two day bench trial held December 27-28, 1995 on related issues.

I. *Background*

A. *Parties*

The Plaintiffs in this action are former executives of Cluett Peabody & Co. ("Cluett"), an apparel manufacturer which was acquired by Defendant WestPoint-Pepperell, Inc. ("WestPoint") in 1986. WestPoint is a Georgia corporation conducting business in textile, apparel and bed products. Cluett was merged into WestPoint in January 1989 and operated as a division of WestPoint until March 1990, when Cluett was sold to Bidermann Industries, Inc.

Defendant D. Michael Roark ("Roark") was Vice President of Human Resources for Cluett at all relevant times until 1986, and then Vice President of Human Resources for WestPoint until May 1989. Defendant C. Powers Dorsett ("Dorsett") was, at all relevant times, WestPoint's General Counsel. Defendant Barry F. Shea was Assistant Treasurer and then Treasurer of WestPoint, and a member of the Cluett Retirement Plan

Committee. Patrick Walsh ("Walsh"), not a party to this action, was, at all relevant times, Assistant Treasurer of Cluett, and the day-to-day administrator of the Executive Permanent Insurance Program ("EPI Program").

B. *Factual Background*

In 1975, Cluett established for its senior executives an employee benefit program known as the EPI Program. This program consists of retirement and life and health insurance benefits, including a deferred compensation agreement which provides supplemental pension benefits. Plaintiffs are participants in the EPI program and are parties to a deferred compensation agreement under that program.

On July 29, 1987, WestPoint's Compensation Committee recommended that Cluett's Board adopt a "Change in Control" amendment to the EPI Plan (the "EPI Amendment"), which would provide EPI participants with a lump sum payment upon a "Change in Control" of WestPoint. Cluett's Board approved the EPI Amendment on July 30, 1987, although it was not finalized until November 1988. On November 11, 1988, the EPI Amendment was circulated to the EPI participants; within a few weeks, Plaintiffs all returned executed copies of this Amendment.

In late 1988 and early 1989, WestPoint took steps to change the discount rate used to calculate the lump sums that EPI participants would receive if a "Change in Control" occurred. The EPI Amendment referred to the actuarial assumptions contained in the Cluett Employee Retirement Plan ("Cluett Pension Plan"), which provided for a 5% discount rate. WestPoint sought to make this rate conform to that used in the

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WestPoint Employee Retirement Plan ("WestPoint Pension Plan"), which provided for a discount rate based on rates published by the Pension Benefit Guaranty Corporation ("PBGC"). Accordingly, the Cluett Pension Plan Committee ("Cluett Committee") met on February 16, 1989 and purported to adopt a PBGC-based rate for the Cluett Pension Plan.[1]

The following week, Roark sent each EPI participant a letter, dated February 22, 1989, advising that lump sum payments would be calculated using a PBGC-based rate of 9.3%. Accompanying this letter was an election form which gave the participants two choices: (1) they could receive the lump sum payment based on the PBGC-based rate and release WestPoint from any further obligation; or (2) they could revoke the November 11, 1988 EPI Amendment and forfeit the right to receive a lump sum payment. Each of the *Allen* Plaintiffs checked a box indicating that he was selecting the first option, and returned the form to Roark.[2] On or about April 5, 1989, the *Allen* Plaintiffs each received a lump sum payment calculated using a 9.3% discount rate.

In an Opinion and Order dated November 2, 1995, I held that the Cluett Committee had no authority under ERISA to change the discount rate contained in the Cluett Pension Plan. *See Allen v. West Point-Pepperell, Inc.*, 908 F. Supp. 1209,

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1. The group that met on February 16, 1989 consisted of the members of the WestPoint Management Pension Committee. In 1988, the WestPoint Management Pension Committee was appointed by the Cluett Board of Directors to act as the Cluett Committee. *See Allen v. West Point-Pepperell, Inc.*, 908 F. Supp. 1209, 1214 (S.D.N.Y. 1995). Thus, this group acted as the Cluett Committee at its February 16 meeting.

2. Plaintiff Robert Krumme refused to sign the release.

1222 (S.D.N.Y. 1995). "Accordingly, the 5% discount rate printed in the Cluett Pension Plan was never validly changed and was at all relevant times one of the actuarial assumptions 'contained in' the Cluett Pension Plan for purposes of the EPI Amendment." *Id.* at 1222-23.

The *Allen* Plaintiffs now seek rescission of the releases they executed in early 1989. They contend that rescission is appropriate because the releases were the product of a "mutual mistake" on the part of WestPoint and themselves concerning the discount rate contained in the Cluett Pension Plan. In addition, both the *Allen* Plaintiffs and Robert Krumme seek attorneys' fees pursuant to a provision contained in the EPI Amendment which provides that an executive will be paid or reimbursed for fees "[i]f at any time upon or after a change in control there should arise any dispute" concerning an interpretation of the EPI Amendment.

I. *Findings of Facts*

On January 27, 1987, the WestPoint Board of Directors discussed the possibility of amending its employee benefit plans to protect participants in the event the company experienced a change in control. The Board instructed management to review all employee benefit plans and to report back to the Board with its recommendations. *See* Minutes of January 27, 1987 Board meeting, Def. Ex. A. After management conducted such a review, Dorsett, WestPoint's General Counsel, presented his report and recommendations to the WestPoint Board's Compensation Committee on June 23, 1987. *See* Minutes of June 23, 1987 Compensation Committee Meeting, Def. Ex. KK. The Compensation Committee approved management's recommendations and resolved to present them to the full Board. *See id.*

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The Compensation Committee reported management's recommendations to the Board on June 24, 1987. With respect to the EPI Program, management recommended that "the present value of the benefit be paid by way of lump sum upon a change in control." Compensation Committee Report, Def. Ex. B. No specific method of determining present value was mentioned in management's recommendations; the intent was simply to provide "the fair present value that would be properly calculated with a realistic interest rate." Testimony of C. Powers Dorsett, General Counsel of WestPoint, Trial Transcript ("Tr.") 913.

In the month following the June 24, 1987 Board meeting, draft amendments to several of WestPoint's benefit plans (including the EPI Program) were prepared. These amendments were presented to, and approved by, the WestPoint Compensation Committee at a meeting on July 29, 1987. *See* Minutes of July 29, 1987 Compensation Committee Meeting, Def. Ex. C. At this time Cluett, although owned and controlled by WestPoint, still had its own Board of Directors. The Compensation Committee thus recommended to the Cluett Board that it adopt the proposed amendment to the EPI Program permitting lump sum payments in the event of a change of control. Tr. 916. On July 30, 1987, the Cluett Board authorized management to enact such an amendment. *See* Action of Cluett Board, Pl. Ex. 119.

A. *Drafting of the EPI Amendment*

Ronald Heller, then General Counsel of Cluett, prepared the initial draft of the EPI Amendment. Tr. 916. The draft provided for participants to receive, upon a change in control, the present value of their accrued EPI benefit, defined as the

"actuarial equivalent" of that benefit. Section 4A(l)(c) of the draft EPI Amendment defined "actuarial equivalent" as follows:

> The term "Actuarial Equivalent" means, with respect to an Accrued Benefit, any Deferred Compensation (or contingent Deferred Compensation, as the case may be) benefit provided under the terms of this Agreement which has the same present value as the Accrued Benefit. For the purpose of establishing whether a benefit is the Actuarial Equivalent of another benefit the actuarial assumptions contained in Cluett's Employee Retirement Plan shall be employed for so long as that Plan remains in existence and if such Plan is no longer in existence, the actuarial assumptions last used by such Plan shall be used.

This language was based on a change in control amendment to the WestPoint Supplemental Executive Retirement Plan (the "SERP Amendment"), which Heller used as a model in drafting the EPI Amendment. Tr. 918-19. Indeed, the definition of "actuarial equivalent" in the two amendments is identical except in one respect: where the SERP Amendment refers to the actuarial assumptions contained in WestPoint's Pension Plan, Heller referenced the assumptions contained in the Cluett Pension Plan. *Id.*

The actuarial assumptions in the Cluett Pension Plan had not been changed for many years and were outdated. The Plan provided for a discount rate of 5%, which was well below the market rate. When TPF&C, an actuarial services firm, became the Plan Actuary for the Cluett Pension Plan in 1986, it notified WestPoint of this problem and recommended that the PBGC

based rates used in the WestPoint Pension Plan be adopted for the Cluett Pension Plan. However, under the Cluett Pension Plan, lump sums were only payable in *de minimis* amounts;[3] accordingly, substantial sums were not at stake and WestPoint declined to assign a high priority to changing the actuarial assumptions. *See* Deposition of Steven A. Harrold, Vice President of TPF&C, dated July 27, 1989, at 100-01, 105-06, 107; Deposition of Steven A. Harrold, dated December 6, 1994, at 57-58, 113-16.

B. *Finalizing the EPI Amendment*

Although the change in control amendments to WestPoint's other benefit plans were implemented in 1987, this was not the case with the EPI Amendment. While working on the Amendment, Heller discovered that — under certain circumstances — it could result in payments duplicative of benefits provided under the EPI Program's life insurance policy. Without a ready solution to this problem, the WestPoint legal staff temporarily shelved the EPI Amendment. Tr. 921-22.

On October 24, 1988, Farley Inc. launched a takeover bid for WestPoint. Complaint ¶ 19. As a result of this action, WestPoint conducted a review of its unfunded employee benefit plans. During that review, management discovered that the EPI Amendment had never been finalized. Tr. 924. Dorsett then instructed Clay Humphries, a WestPoint attorney, to take the steps necessary to get the Amendment finalized. *Id.* Dorsett told Humphries to draft the EPI Amendment in a manner

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3. The discount rate in the Cluett Pension Plan was used only for calculating lump sums under $3,500. *See* Deposition of Steven A. Harrold, TPF&C Actuary, dated July 27, 1989, 101-02.

consistent with WestPoint's other change in control amendments. Tr. 1040.

Humphries obtained a copy of the Heller draft and hurriedly began finalizing it. Because he was completely unfamiliar with the EPI plan, Humphries was reluctant to make any substantive changes. Tr. 1013. Additionally, he did not know that the actuarial assumptions contained in the Cluett Pension Plan differed from those contained in the WestPoint Pension Plan; thus, although he had been instructed to make the EPI plan consistent with WestPoint's other plans, he left intact the Amendment's reference to the actuarial assumptions contained in the Cluett Pension Plan. Tr. 1017, 1019.[4]

After amending the Heller draft, Humphries sent a copy of it to Walsh to get his comments. On November 10, 1988, Walsh wrote to Humphries suggesting that the definition of "Actuarial Equivalent" in Section 4A(1)(c) of the draft Amendment be revised to specify that an interest rate of 5% would be used to calculate the present value of future EPI benefits. *See* Undated Draft Amendment, Joint Ex. 6; Walsh Memo, dated November 10, 1988, Joint Ex. 15. Humphries rejected Walsh's suggestion that the discount rate be spelled out because he wanted all change in control amendments to be consistent. He sent Walsh a handwritten note that stated:

> I think we need to adopt the amendment as it is drafted if at all possible, for the sake of uniformity.

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4. It is unclear whether Humphries even noticed that the Heller draft referred to the Cluett Pension Plan's actuarial assumptions. In any event, he testified that "it wouldn't have jumped out at me, because as far as I was concerned [the Cluett and WestPoint Pension Plans] used the same rates." Tr. 1019.

> We have several plans with these amendments and I would like for them to all read alike.

Joint Ex. 15.

When Humphries rejected Walsh's suggested revision, he still did not realize that the actuarial assumptions contained in the Cluett Pension Plan differed from those in the WestPoint Pension Plan. Tr. 1017. He thought he remembered being told by an actuary that the plans all used the same actuarial assumptions. Tr. 1018-19. Moreover, because Humphries had no familiarity with the concept of discount rates, the 5% rate in Walsh's suggested revision did not attract his attention. Tr. 1017. At trial, Humphries expressed regret for his oversight: "I have spent many sleepless nights concerned that I was the one most able to catch this mistake and didn't do it, and all this would have been for naught." *Id.*

On November 11, 1988, the EPI Amendment was circulated to the EPI participants under a cover letter. Consistent with the Board's intent, the cover letter stated that the EPI Amendment would provide for payment "of the present value of the benefits called for under the (Deferred Compensation] Agreement." *See* Letter from Patrick Walsh to EPI Participants, Joint Ex. 19. Each of the Plaintiffs returned an executed copy of the EPI Amendment to Walsh within a few weeks of receiving it.

C. *WestPoint Discovers the Error*

In early February 1989, Roark learned from Walsh that a 5% discount rate would be used to calculate lump sums under the EPI Amendment. Tr. 1065. The news came as a shock to Roark and was of great concern to him. He was troubled because

the Chairman of the Board had instructed management to make the methodology used under the various amendments consistent, and Roark had assured members of the board that this would be done. Tr. 1065-66, 1111. Additionally, Roark believed that a 5% discount rate was "totally inappropriate" given the high interest rates that prevailed at the time. Tr. 1070-71. Indeed, in February 1989, even the interest rate on a 30-year Treasury Bill — a very conservative investment — exceeded 9%. *See* Federal Reserve Statistical Release, Def. Ex. I.

Roark notified WestPoint management that the discount rate referenced in the EPI Amendment was different from that referenced in WestPoint's other plans. After reviewing pertinent sections of the Cluett Pension Plan, WestPoint management determined that the discount rate could be changed by the Cluett Committee (then consisting of members of the WestPoint Management Pension Committee) on the advice of the Plan Actuary. Management believed that if the Plan Actuary agreed that the actuarial assumptions contained in the Cluett Pension Plan were outdated and unfair, the Cluett Committee could adopt new assumptions consistent with those in WestPoint's other plans.

TPF&C, the Plan Actuary, was asked its advice in this regard. On February 16, 1989, TPF&C recommended that new actuarial assumptions be adopted, and that the new assumptions be identical to those in the WestPoint Pension Plan. *See* Letter from Steven A. Harrold, dated February 16, 1989, Def. Ex. H(1). That same day, the Cluett Committee met and, pursuant to the Cluett Pension Plan, purported to adopt the actuarial assumptions recommended by TPF&C. *See* Minutes of February 16, 1989 Pension Committee Meeting, Def. Ex. H(2).

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Walsh had informed a number of EPI participants that any lump sum payments they received would be calculated using a 5% discount rate. Tr. 1069. WestPoint's management was concerned that some of those participants might have executed the EPI Amendment with that advice in mind. Tr. 1070. Accordingly, WestPoint decided to inform all EPI participants of the discount rate that would be used in calculating lump sum payments, and to give participants an opportunity to rescind the EPI Amendment if they did not desire a payout calculated with the new rate. Tr. 1069.

On February 22, 1989, Roark wrote to the EPI participants notifying them of the 9.3% rate and affording them the opportunity to rescind their November 11, 1989 EPI Amendments. Roark's letter expressly referred to the fact that some EPI participants "have told us they were led to believe that a 5% discount rate would be used to determine lump sum values." Letter from Roark to EPI Participants, dated February 22, 1989, Joint Ex. 22. Roark's letter appended an election form which required each participant to either (1) execute a release of WestPoint in order to be eligible for a lump sum payment or (2) rescind the EPI Amendment. The release contained the following language:

> I understand that the lump sum payment of the actuarial equivalent of my deferred compensation benefit will be in full satisfaction of all obligations of West Point-Pepperell, Inc., as successor to Cluett, Peabody & Co., Inc., under the terms of my Deferred Compensation Agreement, and that in accepting a lump sum payment I shall thereby release West Point-Pepperell, Inc., its directors, officers,

employees, and agents, and its successors and assigns, from all obligations under the Agreement.

Joint Ex. 22. Each of the *Allen* Plaintiffs executed the release.

The *Allen* Plaintiffs understood that the document they were signing released WestPoint from any further obligation to them. Tr. 545, 595, 630, 661, 734, 856, 868. They signed the release under the belief that 9.3% was the discount rate referenced in the EPI Amendment. Tr. 518-19, 566, 568-9, 613, 648, 719, 844, 862.[5]

On April 5, 1989, as a result of Farley's tender offer, a change in control of WestPoint took place and the *Allen* Plaintiffs were sent lump sum payments calculated using the 9.3% rate. When they received the lump sums, the *Allen* Plaintiffs did not feel they had any dispute with WestPoint; they believed they had been paid the full amount owed to them. Tr. 520-21, 570, 614, 648, 721, 647, 864, 880.

D. *Krumme*

Unlike the *Allen* Plaintiffs, Robert Krumme refused to sign the release sent on February 22, 1989. In fact, having heard rumors about the purported change in the discount rate, Krumme wrote a letter of protest to Dorsett one day before the release was sent out. In his letter, Krumme stated, *inter alia*, that he believed the proper discount rate was 5%. *See* Letter from Robert Krumme, dated February 21, 1989, Pl. Ex. 71. On March 1, 1989, Krumme sent a letter to Roark reiterating his view

5. Only Plaintiff James J. Dunne doubted whether 9.3% was the appropriate rate when he signed the release. *See* Telephonic Deposition of James J. Dunne, dated December 14, 1994, at 82.

that he was entitled to be paid at a 5% discount rate. *See* Letter from Robert Krumme, dated March 1, 1989, Pl. Ex. 73.

On March 8, 1989, Krumme wrote a third letter of protest. In this letter, which was addressed to Dorsett, Krumme threatened to take legal action against WestPoint. *See* Letter from Robert Krumme, dated March 8, 1989, Joint Ex. 23. On March 24, 1989, before the change in control payments were made, Krumme sued WestPoint. *See* Complaint in Krumme Action, Def. Ex. CC. Krumme's complaint alleged, *inter alia*, that the change in the discount rate was ineffective and that, if the Cluett Pension Plan had been amended, the amendment had been accomplished without proper authorization and implementation. *See id.* ¶¶28-33.

During the summer and fall of 1989, Krumme contacted several of the *Allen* Plaintiffs to encourage them to bring suit against WestPoint, and to discuss the possibility of their retaining him as counsel. Tr. 524-25, 571, 615, 651-2; *see also Allen*, 908 F. Supp. at 1216. By September 1989, each of the *Allen* Plaintiffs except John Currier ("Currier") and Gerard P. Mandry ("Mandry") had signed a retainer agreement with Krumme. Plaintiffs Currier and Mandry signed such agreements in March and May 1990, respectively. *See Allen*, 908 F. Supp. at 1216. On June 6, 1990, the *Allen* Plaintiffs filed suit.

E. *Attorneys' Fees*

When management recommended installing change in control provisions in various WestPoint benefit plans, it also recommended reimbursing participants for legal fees expended in enforcing their rights under the plan following a change in control. *See* Def. Ex. B. Pursuant to this recommendation, the

following fee-shifting language was included in the EPI Amendment:

> If at any time upon or after a Change of Control there should arise any dispute as to the validity, interpretation or application of any term [or] condition of this Agreement . . . Cluett agrees, upon written demand by an Executive, to provide sums sufficient to pay on a current basis (either directly or by reimbursing the Executive or his legal representative) the Executive's costs and reasonable attorneys' fees (including expenses of investigation and disbursements for the fees and expenses of experts, etc.) (a) incurred by the Executive in connection with any dispute or litigation, regardless of whether the Executive is the prevailing party, involving any provision of this Agreement, provided that the court in which such litigation is pursued determines, upon application of any party, that the Executive or his legal representative did not initiate frivolously such litigation . . . .

EPI Amendment, Joint Ex. 18 at 5.

III. *Conclusions of Law*

A. *Mutual Mistake*

As noted, the *Allen* Plaintiffs seek to rescind the releases on the ground that both they and WestPoint mistakenly believed that 9.3% was the proper discount rate for calculating lump sums under the EPI Amendment. As a general rule, "a contract is voidable under the equitable remedy of rescission if the

parties entered into the contract under a mutual mistake of fact which is substantial and existed at the time the contract was entered into." *Rekis v. Lake Minnewaska Mountain Houses, Inc.*, 573 N.Y.S.2d 331, 335 (3d Dep't 1991). However, rescission is not available as a matter of law; it is an equitable remedy that the Court may impose in its discretion, after weighing all the attendant facts and circumstances. *See Alden Auto Parts Warehouse, Inc. v. Dolphin Equip. Leasing Co.*, 682 F.2d 330, 333 (2d Cir. 1982) (request for rescission "is addressed to the equity powers of the court"); *Rudman v. Cowles Communications, Inc.*, 30 N.Y.2d 1, 13 (1972) ("plaintiffs are not entitled as a matter of law to rescission. Such relief, lying in equity, is a matter of discretion.").

The facts presented in this case do not justify rescission, which is a "drastic" and "extraordinary" remedy under New York law. *See Canfield v. Reynolds*, 631 F.2d 169, 178 (2d Cir. 1980); *In re Kim*, 15 B.R. 198, 200 (Bankr. S.D.N.Y. 1981). While the parties were mistaken as to the discount rate in effect when the releases were signed, the *Allen* Plaintiffs were experienced businessmen who knew that they were "releasing" WestPoint from any further obligation to them. By executing the releases, the *Allen* Plaintiffs amended and superseded their EPI Amendments, so that the parties' contracts now called for lump sum payments to be computed using the PBGC-based rate. *See Barnum v. Millbrook Care Ltd. Partnership*, 850 F. Supp. 1227, 1236 (S.D.N.Y.), *aff'd*, 43 F.3d 1458 (2d Cir. 1994) ("It is well established that a subsequent contract regarding the same matter will supersede the prior contract.").

The EPI Amendment was intended to give participants the actual present value of their benefits under the EPI Program. When WestPoint discovered that the Cluett Pension Plan's

outdated 5% rate applied to the EPI Amendment, it made a good-faith effort to correct this drafting mistake. The fact that seven years later this Court determined that WestPoint's efforts were ineffective under ERISA is not proper grounds for rescission. *See Anita Foundations, Inc. v. ILGWU Nat'l Retirement Fund*, 902 F.2d 185, 189-90 (2d Cir. 1990) ("a settlement payment, made when the law was uncertain, cannot be successfully attacked on the basis of any subsequent resolution of the uncertainty.").

Rescinding the releases would create an entirely unfair result: WestPoint would be forced to pay the *Allen* Plaintiffs nearly twice the market-based present value of their EPI benefits. *See* Def. Ex. I. Such an outcome would undermine the WestPoint Board's understandable desire to harmonize the payout methodologies used in its various benefit plans. Moreover, it would provide the *Allen* Plaintiffs with an undeserved and unintended windfall.[6]

Several of the *Allen* Plaintiffs testified that they did not seek a windfall, but only a fair approximation of the present value of their benefits under the EPI Program. Tr. 625, 656-7, 851-2, 866. I find that each of them has already received such payment and that rescinding the releases would only work an

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6. At trial, the *Allen* Plaintiffs presented evidence of specific benefits — such as a restricted stock plan — contained in some WestPoint plans that were not available under the EPI Program. Tr. 968. They suggested that the 5% discount rate may have been intended to compensate for such differences. However, there is absolutely no evidence that the inclusion of the 5% rate was anything other than a mistake. Moreover, it is not clear that the benefit plans available to WestPoint's executives were more generous than those provided to Cluett's executives; indeed, Roark, who worked for both companies, testified that the opposite was true. Tr. 1081, 1086.

injustice upon WestPoint. I therefore decline to impose the equitable remedy of rescission.

B. *Attorneys' Fees*

The attorneys' fee clause contained in the EPI Amendment is extremely broad. It provides costs and attorneys' fees to an executive for "any dispute as to the validity, interpretation or application of any term [or] condition of this Agreement . . . regardless of whether the Executive is the prevailing party." Joint Ex. 18. The only requirements are that the dispute arise "upon or after a change of control," and that the executive does not "frivolously" bring suit.

Defendants contend that the fee-shifting clause was only intended to apply to disputes with a hostile acquiror such as Farley, not disputes with WestPoint's prior management. However, on its face the clause does not distinguish between disputes with outgoing management and those with incoming management. Rather, it mandates that an executive be compensated for "*any* dispute" concerning the interpretation or application of any term of the EPI Amendment (provided the dispute arises upon or after a change in control, and is not frivolous). Where a contract's language is unambiguous, " 'its meaning must be determined from the four corners of the instrument without resort to extrinsic evidence of any nature.' " *Goodheart Clothing Co. v. Laura Goodman Enterprises, Inc.*, 962 F.2d 268, 272 (2d Cir. 1992) (quoting John D. Calamari & Joseph M. Perillo, *Contracts* 166-67 (3d ed. 1987)). I therefore reject Defendants' claim that the clause does not apply to disputes with WestPoint's old management.[7]

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7. Because it might well be the case that WestPoint did not intend for the attorneys' fee provision to apply to disputes with prior (Cont'd)

Appendix B

Neither the *Allen* action nor the *Krumme* action could reasonably be termed frivolous. An action is frivolous where it is "clear under existing precedents that there is no chance of success and no reasonable argument to extend, modify or reverse the law as it stands." *Mareno v. Rowe*, 910 F.2d 1043, 1047 (2d Cir.), *cert. denied*, 498 U.S. 1028 (1991). This is not the situation here, where both actions have involved hotly contested, close questions of law and fact. Accordingly, Plaintiffs are entitled to attorneys' fees if their disputes arose "upon or after a change in control."

1. *Allen Plaintiffs*

Under the EPI Amendment, a participant was not entitled to a lump sum payment unless and until a change in control actually occurred: "upon the occurrence of a Change in Control the Executive . . . shall be paid in a lump sum a benefit equal to the Actuarial Equivalent of the Executive's . . . Accrued Benefit . . . ." EPI Amendment, Joint Ex. 18 at 3. Prior to a change in control, the *Allen* Plaintiffs had no right to any lump sum payment, and no legally cognizable dispute with WestPoint.

The subject of the *Allen* Plaintiffs' lawsuit is their right to a lump sum payout calculated using a 5% discount rate. Their

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(Cont'd)

management, this result may seem unfair. However, the language of the provision is unambiguous, and the Court is not empowered to rewrite the terms of a contract. *See Breed v. Insurance Co. of North America*, 46 N.Y.2d 351, 355 (1978) (court should not "vary" contract to "accomplish its notions of abstract justice or moral obligation"); *Moshiko, Inc. v. Seiger & Smith, Inc.*, 529 N.Y.S.2d 284, 288 (1st Dep't), *aff'd*, 72 N.Y.2d 945 (1988) (court may not invent ambiguity where none exists).

dispute with WestPoint could not possibly have arisen until April 5, 1989, when the lump sums became due and they did not receive such a payout. The *Allen* Plaintiffs are therefore entitled to be compensated by WestPoint for their costs and attorneys' fees.[8]

2. *Krumme*

Unlike the *Allen* Plaintiffs, Krumme began fighting with WestPoint management over his EPI benefits prior to the Farley takeover. He wrote letters asserting that his benefit should be calculated using a 5% discount rate, and brought suit against WestPoint on March 24, 1989, approximately two weeks before a change in control occurred. Nonetheless, because Krumme's rights under the EPI Amendment could not have vested until April 5, 1989, his "dispute" — like that of the *Allen* Plaintiffs — could not have arisen until that time. WestPoint must therefore compensate Krumme for the costs and attorneys' fees he incurred in this suit.

IV. *Conclusion*

For the foregoing reasons, I decline to rescind the releases executed by the *Allen* Plaintiffs. Further, I find that both the *Allen* Plaintiffs and Krumme are entitled to have their attorneys' fees and costs paid by WestPoint.

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8. In actuality, most of the *Allen* Plaintiffs had no dispute with WestPoint until well after April 5, 1989. At trial, all but one of the *Allen* Plaintiffs testified that when they received their lump sum payouts, they believed they had been paid all to which they were entitled. Tr. 520-21, 570, 614, 648, 721, 847, 864, 880. Hence, their dispute did not really "arise" until the late summer of 1989, when Robert Krumme contacted them and encouraged them to file suit.

Appendix B

SO ORDERED:

Shira A. Scheindlin
U.S.D.J.

Dated: New York, New York
May 13, 1996

APPENDIX C — AMENDED OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED FEBRUARY 10, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

90 Civ. 3841 (SAS)

GORDON E. ALLEN, JOHN CURRIER, JAMES J. DUNNE, LEO FORNERO, GERARD P. MANDRY, NORMAN K. MATHESON, BRUCE E. MOORE, NICHOLAS PALLOTTA and COCHRAN B. SUPPLEE,

Plaintiffs,

-against-

WESTPOINT-PEPPERELL, INC., D. MICHAEL ROARK, C. POWERS DORSETT and BARRY F. SHEA,

Defendants.

AMENDED OPINION AND ORDER

SHIRA A. SCHEINDLIN, U.S.D.J.:

This Opinion addresses plaintiffs' state common law claims for (1) constructive fraud, (2) negligent misrepresentation, and (3) fraudulent omission. Plaintiffs have submitted these claims for the Court's determination based on a bench trial held earlier this year to determine related issues. For the reasons set forth below, I find defendants[1] not liable with regard to plaintiffs' claims.

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1. Plaintiffs withdrew their claims against defendant Barry Shea by Stipulation of Discontinuance dated January 22, 1997.

Appendix C

Factual Background

Familiarity with the facts of this case will be presumed for the purposes of this opinion as they have been thoroughly discussed by this Court and the Second Circuit during the long course of this litigation. There is no need to recite them here. *See Allen v. WestPoint-Pepperell, Inc.*, 945 F.2d 40, 41-44 (2d Cir. 1991); *Allen v. WestPoint-Pepperell, Inc.*, 933 F. Supp. 261, 263-268 (S.D.N.Y. May 13, 1996); *Allen v. WestPoint-Pepperell, Inc.*, No. 90-3841, 1996 WL 2004, at *1-2 (S.D.N.Y. Jan. 3, 1996); *Allen v. WestPoint-Pepperell, Inc.*, 908 F. Supp. 1209, 1212-1217 (S.D.N.Y. 1995).

Procedural History

In an Opinion and Order dated November 2, 1995, I held the Cluett Committee had no authority under ERISA to change the discount rate contained in the Cluett Pension Plan. *See Allen v. WestPoint-Pepperell, Inc.*, 908 F. Supp. 1209, 1222 (S.D.N.Y. 1995). "Accordingly, the 5% discount rate printed in the Cluett Pension Plan was never validly changed and was at all relevant times one of the actuarial assumptions contained in the Cluett Pension Plan for purposes of the EPI Amendment." *Id.* at 1222-23.

On December 11, 1995, the parties agreed to litigate the change of control issue, the mutual mistake and rescission issues and the question of attorneys' fees before reaching the state common law claims now at issue. A bench trial was held to develop a record on which to resolve those issues. In a Memorandum Opinion dated January 3, 1996, I found that, for purposes of the EPI Amendment, a "change of control" occurred on April 5, 1989. In an Opinion and Order dated May 13, 1996,

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I declined to rescind the Releases signed by plaintiffs on the basis of mutual mistake and granted attorneys' fees to plaintiffs. *See Allen v. WestPoint-Pepperell, Inc.*, 933 F. Supp. 261 (S.D.N.Y. May 13, 1996).

Discussion

I. ERISA Preemption and Waiver of Preemption

A. ERISA Preemption

A threshold question in the instant action is whether ERISA's preemption clause bars plaintiffs from bringing state common law claims to enforce the EPI pension plan.[2] In pertinent part, ERISA's preemption clause provides as follows:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in [ERISA § 4(a)] and not exempt under [ERISA § 4 (b)].

ERISA § 514(a), codified at 29 U.S.C. § 1144(a). The legislative history behind the preemption clause makes it clear that Congress intended to supplant all state regulation of

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2. The EPI plan is a "top-hat" plan that covered only upper-echelon management personnel. Nevertheless, it is subject to ERISA's preemption clause. *See Bigda v. Fischbach Corp.*, 898 F. Supp. 1004, 1015-16 (S.D.N.Y. 1995), *aff'd*, 1996 WL 107342 (2d Cir. 1996) (summary affirmation based on other grounds). *See also Barrowclough v. Kidder, Peabody & Co. Inc.*, 752 F.2d 923, 936-37 (3d Cir. 1985), *overruled in part on other grounds*, 7 F.3d 1110 (3d Cir. 1993).

employee benefit plans with a uniform federal system.[3] The United States Supreme Court has construed ERISA's preemption language as "deliberately expansive, and designed to establish pension plan regulation as exclusively a federal concern." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45-46 (1987) (quotations omitted). ERISA's preemption clause has also recently been described as "among the broadest that can be found in the law." *See Geller v. County Line Auto Sales, Inc.*, 86 F.3d 18, 22 (2d Cir. 1996). *See generally* James F. Jorden et al., *Handbook on ERISA Litigation* § 2.03 (1994) (describing the wide preemptive effect of ERISA on state law).

This Circuit has previously held that a common law fraud claim for misconduct arising from the administration of an ERISA plan may be preempted. In *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270 (2d Cir. 1992), a demolition company failed to make required pension fund contributions for a group of "off-the-books" workers. The Second Circuit held the plaintiffs' common law fraud claim on behalf of participants and beneficiaries of the pension plan was preempted on the ground that the claim had "as a critical factor in establishing liability the existence of a plan and duties similar to those imposed by ERISA." *Id.* at 288 (quotation omitted).

However, the rule of *Diduck* does not require the preemption of all common law claims arising out of ERISA

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3. U.S. Representative Dent, who sponsored ERISA in the House, stated: "Finally, I wish to take note of what is to many the crowning achievement of this legislation, the reservation to Federal authority the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulations." 120 Cong. Rec. 29197 (1974) (quoted in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 99 (1983)).

plans. The intent of Congress in drafting ERISA's preemption clause "was not to foreclose every state action with a conceivable effect upon ERISA plans, but to maintain exclusive federal control over the regulation of such plans." *NYS Health Maintenance Org. Conference v. Curiale*, 64 F.3d 794, 803 (2d Cir. 1995). Holding that ERISA's preemption clause should not be read to contravene the statute's underlying purpose to protect the interests of participants and beneficiaries of employee benefit plans, the Second Circuit recently held that a state common law claim that "seeks to advance the rights and expectations created by ERISA is not preempted simply because it may have a tangential impact on employee benefit plans." *Geller*, 86 F.3d at 23. In *Geller*, the Second Circuit held that "the essence of the plaintiffs' fraud claim does not rely on the pension plan's operation or management" but rather on defendants' fraudulent misrepresentation of facts relating to a pension plan. *Id.* Where a fraud claim is presented within the context of a pension benefit plan, ERISA does not automatically preempt state common law actions. *Id.*

It is impossible to fit plaintiffs' claims within the *Geller* exception to ERISA preemption of state law actions. Here, plaintiffs' common law actions are brought to enforce the terms of the EPI agreement as they existed before plaintiffs signed Releases altering those terms in 1989. The gravamen of plaintiffs' remaining claims is that, in soliciting plaintiffs' signature on the Release forms, defendants' negligently misrepresented material facts, and fraudulently omitted other material facts, thus causing plaintiffs to sign the Releases to their detriment. Plaintiffs are seeking the amount of EPI benefits that they would have received before the Releases were signed. Understood as such, plaintiffs' claims cannot be classified as "tangential" to the EPI plan. Rather they must be seen as what

they are: an attempt to enforce the EPI plan under terms most favorable to plaintiffs. I therefore find that ERISA's preemption clause applies to the instant claims.

B. Waiver of ERISA Preemption

Both parties agree that ERISA's preemption clause is an affirmative defense that may be waived. Defendants agree to waive any such preemption defense. *See* Letter from Defendants to the Court, dated November 21, 1996; Letter from Plaintiffs to the Court, dated November 22, 1996. However, that the parties have agreed to the application of New York common law to resolve the instant claims does not end the inquiry into the question of preemption. The preemptive effect of federal legislation on state law implicates broad questions of federalism that cannot always be dismissed by the consent of litigating parties. *See, e.g., Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963) ("The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives."); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (whether federal legislation preempts a state law turns on whether or not it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."). *See generally* Laurence H. Tribe, *American Constitutional Law*, §§ 6-26, 6-27 (2d ed. 1988) (discussing federal limits on state power).

The language of ERISA itself does not directly address the question of whether the statute's preemptive effect may be waived. Thus courts have looked to ERISA's legislative history in an attempt to determine Congress's intent regarding this

issue. Defendants cite four Circuit decisions that have held ERISA preemption is an affirmative defense and may be waived.[4] *See Wolf v. Reliance Standard Life Ins. Co.*, 71 F.3d 444, 448-49 (1st Cir. 1995); *Dueringer v. General Am. Life Ins. Co.*, 842 F.2d 127, 130 (5th Cir. 1988); *Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1497 (9th Cir. 1986); *Rehabilitation Inst. of Pittsburgh v. Equitable Life Assur. Soc'y*, 131 F.R.D. 99, 101 (W.D. Pa. 1990), *aff'd*, 937 F.2d 598 (3d Cir. 1991) (affirmed without opinion). These cases hold that ERISA's preemption clause is a choice of law provision, rather than a choice of forum provision.[5]

Wolf's holding that the protection of ERISA's preemption clause is waivable was in part grounded in the First Circuit's determination that:

> [T]he interests in uniformity which Congress hoped to serve in ERISA did not extend to permitting defendant corporations, often more sophisticated about ERISA than individual plaintiffs, to sit on their hands and not claim the [preemption] defense until the last minute. That employers were meant to enjoy the benefits of uniformity did not mean that they could not forego those benefits.

Wolf, 71 F.3d at 448 (citations omitted). *Wolf* is also based on precedent. In *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 44-

4. The question of whether ERISA preemption is jurisdictional and thus not waivable, or an affirmative defense that may be waived, has not been addressed by the Second Circuit.

5. It is well established that choice of forum preemption is not waivable. *See Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 398-99 (1986).

46 (1987), the Supreme Court concluded that ERISA's preemption clause was modeled after the preemption clause of the Labor Management Relations Act ("LMRA") and that courts should look to LMRA preemption decisions when deciding the scope of ERISA's preemption clause. *Wolf*, observing that the First Circuit previously held that LMRA preemption is waivable in *Sweeny v. Westvaco Co.*, 926 F.2d 29, 40 (1st Cir.) (Breyer, C.J.), *cert. denied*, 502 U.S. 899 (1991), determined, *a fortiori*, that ERISA preemption was waivable.

The Second Circuit has not ruled directly on the issue of whether LMRA preemption is waivable. However, Chief Judge (now Justice) Breyer's analysis in *Sweeney* is both thorough and persuasive. In fact, *Sweeney's* holding that LMRA preemption is waivable is in part based on the Fifth and Ninth Circuits' holdings that ERISA preemption is waivable. *Id.* at 40 (citing *Dueringer*, 842 F.2d at 130 and *Gilchrist*, 803 F.2d at 1497). These cases lead me to conclude that ERISA's preemption clause was intended as a choice of law provision. Thus understood, it cannot be interpreted to be jurisdictional and non-waivable and defendants may effectively waive their right to raise ERISA's preemption clause in opposition to plaintiffs' state law claims.

II. Legal Standards Applicable to Plaintiffs' State Common Law Claims

A. Elements of Plaintiffs' Common Law Actions

Plaintiffs now bring three common law actions against defendants for (1) constructive fraud, (2) negligent misrepresentation and (3) fraudulent omission. Set forth below is a brief summary of the required elements of each action under the common law of New York.

Appendix C

Under New York law, constructive fraud may be defined as "a breach of duty which, irrespective of moral guilt and intent, the law declares fraudulent because of its tendency to deceive, to violate a confidence or to injure public or private interests which the law deems worthy of special attention." *Grand Union Mount Kisco Emp. Fed. Cr. U. v. Kanaryk*, 848 F. Supp. 446, 455 (S.D.N.Y. 1994) (quoting *Brown v. Lockwood*, 432 N.Y.S.2d 186, 193 (2d Dep't 1980)). To establish a claim for constructive fraud, plaintiffs must show (1) a confidential or fiduciary relationship[6] exists, or alternatively that one party has superior knowledge not available to the other; (2) a representation of fact which is false; (3) justifiable reliance on such false representation; and (4) detriment as a result of such reliance. *See Callahan*, 514 N.Y.S.2d at 821 (citations omitted). A plaintiff who attempts to establish a *prima facie* case for constructive fraud by establishing the abuse of a fiduciary or confidential relationship need not prove actual knowledge of falsity or scienter. *Id.* (citing, *inter alia*, *Del Vecchio v. Nassau County*, 499 N.Y.S.2d 765, 768 (2d Dep't 1986); *Brown*, 432 N.Y.S.2d at 193; 24 N.Y. Jur., Fraud and Deceit §§ 2, 17, 109 (1962)).

The elements of negligent misrepresentation are (1) carelessness in imparting words; (2) upon which others were expected to rely; (3) upon which they did justifiably rely; (4) to their detriment; and (5) the author must express the words directly, with knowledge they will be acted upon, to one whom the author is bound by some relation or duty of care. *See Ultramares Corp. v. Touche, Nevin, & Co.*, 255 N.Y. 170 (1931)

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6. *Brown*, 432 N.Y.S.2d at 194, further defined the required relationship as one "warranting the trusting party to repose his confidence in the defendant and therefore to relax the care and vigilance that he would ordinarily exercise in the circumstances."

(Cardozo, J.); *Glanzer v. Shepard*, 233 N.Y. 236, 239-241 (1922) (Cardozo, J.); *Mallis v. Bankers Trust Co.*, 615 F.2d 68, 81-82 (2d Cir. 1980) (Friendly, J.), *cert. denied*, 449 U.S. 1123 (1981). *See also Patell Industrial Machine v. Toyoda Machinery U.S.A.*, 880 F. Supp. 96, 99 (N.D.N.Y. 1995) (citing, *inter alia*, *Mallis*, 615 F.2d at 81).

New York also recognizes a claim for fraudulent omission. This action is a permutation of the common law action for fraud. As one New York court explained, "nondisclosure is tantamount to an affirmative misrepresentation where a party to a transaction is duty-bound to disclose certain pertinent information." *Callahan v. Callahan*, 514 N.Y.S.2d 819, 821 (3d Dep't 1987). To establish a claim for failure to disclose material information, plaintiffs must show (1) plaintiffs and defendants were party to a contract; (2) defendants had superior knowledge of material facts; (2) that knowledge was not available to plaintiffs; (3) defendants failed to disclose that knowledge to plaintiffs; (4) scienter[7]; (5) that plaintiffs were justifiably deceived by that failure to disclose; and that (6) plaintiffs were damaged as a result of the failure to disclose. *See Allen v. WestPoint-Pepperell, Inc.*, 945 F.2d 40, 45-46 (2d Cir. 1991); *Callahan*, 514 N.Y.S.2d at 821; *Young v. Keith*, 492 N.Y.S.2d 489, 490-91 (3d Dep't 1985).

B. Standards of Proof

It is commonly accepted under New York law that "evidence of fraud is rarely susceptible of direct proof and must ordinarily be established by circumstantial evidence and the

7. The scienter requirement of fraud actions may be satisfied by a showing of "reckless indifference to error". *Skrine v. Staiman*, 292 N.Y.S.2d 275, 276 (2d Dep't 1968), *aff'd*, 298 N.Y.S.2d 727 (1969).

legitimate inferences arising therefrom." *Kanaryk*, 848 F. Supp. at 455. *See also Goshen Litho, Inc. v. Kohls*, 582 F. Supp. 1561, 1564 (S.D.N.Y. 1983); *Abrahami v. UPC Const. Co., Inc.*, 638 N.Y.S.2d 11, 13 (1st Dep't 1996). Recognizing the ease with which such inferences may be asserted, New York courts require fraud and constructive fraud to be proven by clear and convincing evidence. *See Katara v. D.E. Jones Commodities, Inc.*, 835 F.2d 966, 971 (2d Cir. 1987); *Kanaryk*, 848 F. Supp. at 455; *Geller v. National Westminster Bank, USA*, 770 F. Supp. 210, 212-13 (S.D.N.Y. 1991). This evidentiary standard forbids the awarding of relief "whenever the evidence is loose, equivocal or contradictory". *Abrahami*, 638 N.Y.S.2d at 13 (quotation omitted).

Negligent misrepresentation is a species of fraud that replaces the required showing of scienter with a showing of negligence. Like actions for fraud, negligent misrepresentation actions typically are based on inference rather than direct evidence. Thus, New York's high standard of "clear and convincing" proof applies to actions for negligent misrepresentation as well as actions for intentional fraud. *See Alice D. v. William M.*, 450 N.Y.S.2d 350, 354 (N.Y. City Civ. Ct. 1982). *Cf. Ajax Hardware Mfg. Corp. v. Industrial Plants Corp.*, 569 F.2d 181, 186 (2d Cir. 1977) (discussing "clear and convincing" standard required of actions for fraud and citing *Jo Ann Homes at Bellmore, Inc. v. Dworetz*, 302 N.Y.S.2d 799 (1969); *Manchel v. Kasdan*, 144 N.Y.S.2d 694 (1st Dep't 1955) (*per curiam*), *aff'd*, 151 N.Y.S.2d 940 (1956); *Cave v. Green*, 120 N.Y.S.2d 865 (1st Dep't 1953), *aff'd*, 308 N.Y. 754 (1955)). Similarly, an action for fraudulent omission is a kind of fraud action, *see Young*, 492 N.Y.S.2d at 490-91 (citing 24 N.Y. Jur. Fraud and Deceit § 106, at 159 (1962)), and requires plaintiffs to meet a "clear and convincing evidence" standard of proof.

Appendix C

III. Determination of Plaintiffs' Claims

A. Plaintiffs' Allegations

All three of plaintiffs' common law claims arise out of the same set of factual allegations of defendants' wrongdoing, which are briefly summarized here. In the mid-1970's, Cluett Peabody & Co. ("Cluett") agreed with its senior executives to institute an Executive Permanent Insurance Program (the "EPI Program"), under which deferred compensation benefits would be paid to the senior executives.[8] WestPoint-Pepperell, Inc. acquired Cluett in January, 1986. In anticipation of a hostile takeover during November, 1988, WestPoint offered the EPI Program participants the opportunity to subscribe to a favorable change in terms of the agreement, sending each participant an amendment form (the "EPI Amendment"). Each of the plaintiffs signed and returned that form. Under the EPI Amendment, a participant would be entitled to receive from WestPoint lump sum payments in an amount equal to the "actuarial equivalent" of the participant's retirement benefits in the event of a takeover.

The EPI Amendment defined "actuarial equivalent" as an amount having "the same present value as the accrued benefit". To calculate the actuarial equivalent, the EPI Amendment referred to "the actuarial assumptions contained in Cluett's Employee Retirement Plan." That Plan provided:

> "Actuarial equivalent" means an amount of equal value when computed on the basis of interest,

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8. Under the EPI Program, each participant would be entitled to receive 30% of his final base salary for life upon reaching the age of 65, with payments of half that amount made to a designated beneficiary upon the participant's death. *See Allen*, 945 F.2d at 41.

> mortality and other tables as shall be adopted from time to time by the [Cluett Pension] Committee on the advice of the Actuary, the current factors being as specified below:
>
> (1) Mortality table. The . . . 1971 Group Annuity Mortality Table projected to 1978.
>
> (2) Interest rate. 5% per annum, compounded annually.

See Allen, 945 F.2d at 42.[9]

Plaintiffs allege that in early 1989, defendants' interest in participating in a leveraged buy-out of WestPoint motivated

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9. The process of determining the present value of a future cash flow is often referred to as "discounting" or "capitalizing" an income stream. The most simple formula for approximating the present value of a cash flow one year from now may be expressed:

$$PV = C / (1 + R)$$

PV equals the present value of the future income, C is the amount of the income expected one year from now, and R is the annual rate of interest on C amount of money invested now. *See* R. Brealey & S. Myers, Principles of Corporate Finance 29-31 (4th ed. 1991) (explaining how to determine the value of assets that produce future income); Michael C. Thomsett, The Mathematics of Investing 30-31 (1989) (same).

As R *decreases*, the present value of the future income *increases*. Applying this principle to the instant case, one sees that as the discount rate decreases, the present value of the benefits owed to EPI participants increases. It is for this reason that plaintiffs seek to apply an interest rate of 5% and defendants argue that the applicable interest rate is 9.3%.

them to execute "drastic cost-cutting measures". *See* Plaintiffs' Trial Memorandum at 7. It was at this time that WestPoint's management attempted to reduce the EPI payments by increasing the interest rate to 9.3%, thereby saving WestPoint approximately $4 million dollars. Plaintiffs now maintain "[b]ecause of the serious conflict of interest these events created for WestPoint's executives, they should have exercised extreme care both in addressing the discount rate issue and in communicating with the EPI Participants." *Id.*

Plaintiffs base their common law actions on the combination of the Releases and the February 22 Letter. The February 22 Letter, addressed from defendant Roark to plaintiff Allen, states in pertinent part:

> There has apparently been some confusion as to the method of calculation to be employed in determining the lump sum benefit under the Cluett Deferred Compensation Agreements. Some participants have told us that they were led to believe that a 5% discount rate would be used to determine lump sum values. This is incorrect . . . . The [discount rate] is 9.3%. Because of the confusion regarding the discount rate, we are giving you an opportunity to revoke the amendment and are enclosing an election form to revoke the [EPI Amendment] and are enclosing an election form which is to be used to affirm or revoke the [EPI Amendment].

See Affidavit of Frederick A. Brodie, Counsel for defendants, at Exhibit 2. The Releases gave plaintiffs the choice of ratifying the 9.3% rate or revoking the EPI Amendment altogether. The former would allow plaintiffs to receive a lump sum payout

upon the event of a takeover, but a smaller payout than would have been received if the 5% interest rate was used. The latter would prevent plaintiffs from receiving any lump sum payout upon the event of takeover; if plaintiffs revoked the EPI Amendment they would not begin to receive any payouts of benefits under the EPI Program until age 65.

Plaintiffs argue that "the February 22 Letter misrepresented the applicable interest rate and failed to advise the EPI participants of material information regarding the timing and manner in which WestPoint had purported to reduce the lump sum payouts." Plaintiffs' Trial Memorandum at 2. Plaintiffs claim WestPoint solicited the Releases solely through the February 22 Letter, which "at best was an effort to slide the 9.3% discount rate by the EPI Participants without making too many waves and to gather a parcel of Releases in the bargain." *Id.* at 8.

B. Claim for Constructive Fraud

Plaintiffs' action for constructive fraud fails because plaintiffs have not shown by clear and convincing evidence that defendants made a false representation of fact upon which they relied to their detriment. Plaintiffs assert that the February 22 Letter's representation that the applicable interest rate was 9.3%, as opposed to 5%, was false because the Cluett Committee lacked the authority to change that rate. *See* Plaintiffs' Trial Memorandum at 5. Plaintiffs also claim that defendant Dorsett made a false representation of fact on February 16, 1989 when he stated to Robert Krumme that the 5% interest rate had never been used to calculate a participant's benefits and that subsequently defendant WestPoint made false statements of fact to support Dorsett's statement. *See* Plaintiffs' Trial Memorandum at 9-11.

Neither of these arguments will sustain a claim of constructive fraud. The February 22 Letter makes no false representation. It states that the 9.3% rate had been adopted for all WestPoint retirement benefit plans. Because the Cluett Committee had indeed adopted the 9.3% rate, that statement was true at the time it was made. Plaintiffs, of course, argue that defendants knew at the time that the Committee lacked the power to make this change. However, the record indicates that WestPoint management believed that if the Plan Actuary agreed that the 5% discount rate was outdated, unfair, and inconsistent with WestPoint's other pension plans, the Cluett Committee could adopt the 9.3% rate.[10] *See Allen*, 933 F. Supp. at 266 (finding that WestPoint management believed the Cluett Committee had the authority to adopt the 9.3% rate).

Similarly, neither Dorsett's alleged statement that the 5% rate had never been used to calculate a participant's benefits, nor WestPoint's allegedly false documentary support of that statement will sustain the constructive fraud claim. Whether or not these representations were false, there is no clear and convincing evidence that plaintiffs relied on them to their detriment. There is no evidence that Krumme informed plaintiffs of his interaction with Dorsett, or that Krumme informed plaintiffs of WestPoint's subsequent attempts to substantiate Dorsett's statement, before plaintiffs signed their respective Releases. In fact, plaintiffs' testimony at trial indicates that they did not even speak with Krumme before signing the Releases. Tr. at 514-517 (Allen); 605 (Moore); 646-48 (Mandry); 716-718 (Fornero); 842-45 (Pallotta); 860-61

10. Although I invalidated the Cluett Committee's attempt to change that rate over six years later, this does not retroactively transform the February 22 Letter into a false representation of fact upon which plaintiffs may rest an action for constructive fraud.

(Matheson); 877-78 (Currier).[11] If plaintiffs did not rely on Dorsett's assertion and WestPoint's subsequent documentary support of that assertion in deciding whether to ratify the 9.3% rate, no claim for constructive fraud will lie.

C. Negligent Misrepresentation

To succeed on their negligent misrepresentation claim, plaintiffs must first establish that the February 22 Letter and Releases constitute "carelessness in imparting words". *See* Part II(A). Plaintiffs argue that the February 22 Letter and Releases together failed to inform them clearly (1) that the rate incorporated into the original EPI Amendment had, mistakenly or not, been 5%; (2) of the Cluett Committee's decision to change the interest rate to 9.3%; (3) of the defendants' potential conflict of interest stemming from their efforts to reduce costs in order to participate in a leveraged buy-out of WestPoint; (4) that the change of interest rate would reduce the amount of benefits that plaintiffs would receive on change of ownership; and (5) that plaintiffs had the option of challenging the 9.3% rate without forfeiting their right to a lump-sum payout upon change of control. *See* Plaintiffs' Trial Memorandum at 3-7, 11-12. Thus, plaintiffs' negligent misrepresentation claim rests as much on what defendants failed to disclose as it rests on what defendants actually said.[12]

Despite these arguments, I conclude that the combined effect of the February 22 Letter and the Releases did not

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11. Dunne did not testify at trial.

12. An action for negligent misrepresentation may be based on the omission of material information: "half of the truth may obviously amount to a lie, if it is understood to be the whole." *Prosser and Keeton on the Law of Torts* § 106 at 738 (5th ed. 1984).

constitute a negligent misrepresentation on the part of defendants. It was not misrepresentative to fail to inform plaintiffs that the applicable discount rate had always been 5%. The record indicates that defendants believed at all times that the EPI Amendment was intended to incorporate a 9.3% rate — which is to say, a discount rate that would cause the participants to receive the actual present value of their EPI benefits. *See Allen*, 933 F. Supp. at 269. Defendants have consistently maintained that the inclusion of the 5% discount rate by reference to the Cluett Pension Plan was a mistake. *See* Defendants' Trial Memorandum at 9-10. Thus, defendants' statements that the applicable discount rate was 9.3% was based on defendants' understanding of the EPI Agreement, and cannot be viewed as a misrepresentation.

Nor was it a misrepresentation to fail to explicitly inform plaintiffs that the 9.3% discount rate would reduce the amount of benefits EPI participants would receive upon a change of control, or that they had the option of challenging the 9.3% rate without forfeiting their right to a lump-sum payout. Plaintiffs are all sophisticated businessmen. As such, they are obliged under New York law to exercise ordinary diligence and to conduct an independent appraisal of their choices before entering into any business or legal transactions. *See Abrahami*, 638 N.Y.S.2d at 14. If plaintiffs did not understand the financial consequences of accepting the 9.3% rate, they should have sought the advice of an independent attorney or accountant before signing the Releases.

Additionally, defendants had no obligation to disclose the Cluett Committee's decision to "change" the discount rate to 9.3%. The record indicates that the Cluett Committee attempted to conform the relevant documents to the parties' original

understanding regarding the discount rate to be used by the EPI Amendment. *See, e.g.*, Tr. at 913, 927-28 (Dorsett); Tr. at 1065-68 (Roark). As plaintiffs had already approved of the 9.3% rate when they signed the EPI Amendment, it is not reasonable to assume that knowledge of the Committee's action would have changed their decision to sign the Releases.

Nor were defendants obliged to inform plaintiffs of the possibility of a conflict of interest stemming from defendants' potential interest in a leveraged buy-out effort.[13] Plaintiffs allegation that defendants had a conflict of interest is not supported by "clear and convincing evidence". In theory, it is true that reducing WestPoint's outstanding expenses would make a leveraged buy-out more feasible by lowering the company's interest expense on any borrowed capital. Yet defendants have testified that they did not expect to derive any personal benefit from adopting the 9.3% discount rate. *See* Affidavit of Frederick Brodie, Counsel for Defendants, Ex. 4 at 132 (Deposition of D. Michael Roark) ("Q: At the time when you decided that the EPI discount rate should be changed, did you have any idea of the order of magnitude of so-called savings from making the change? A: No . . . . Q: Did you gain anything in the change in the EPI discount rate? A: No."); *Id.*, Ex. 19 at 94-95 (Deposition of C. Powers Dorsett) ("Q: Mr. Dorsett, do you have any personal motive in any action you took with respect to changes in the EPI discount rate? A: No."). Plaintiffs

13. Plaintiffs argue that WestPoint executives believed the success of a leveraged buy-out by a financial group with which they could participate depended on "drastic cost cutting measures." Plaintiffs' Trial Memorandum at 7. Plaintiffs base their conflict of interest argument on the allegation that defendants deliberately adopted the 9.3% discount rate in an effort to cut costs and thereby effectuate a leveraged buy-out. *Id.*

have produced no evidence that casts doubt on the veracity of this testimony.

Additionally, Dorsett testified that no definite prospect of a management buy-out existed after February 1, 1989. *See id.*, Ex. 19 at 96. While it may be true that WestPoint's Board of Directors continued to search for a friendly buyer after that date, the evidence suggests that no concrete possibility of a leveraged buy-out existed by February 16, 1989, when the Cluett Committee adopted the 9.3% rate. *See* Affidavit of Robert J. Hausen, Counsel for Plaintiffs, Ex. I at A000219 (indicating that as of February 16, 1989, WestPoint Board of Directors anticipated that Merrill Lynch Capital Partners and the Wasserstein Perella/Blackstone Group would make a friendly tender offer, but also stating that "no agreements had been reached" at that point). *See also* Letter from Robert J. Hausen, Counsel for Plaintiffs, to Court, dated January 24, 1997 at 2-3 (setting forth chronology of WestPoint's contact with prospective bidders). I therefore find there was no actual leveraged buy-out under way after February 1, 1989, and conclude that defendants cannot be said to have had a conflict of interest merely because they were looking for a "white knight" that would acquire WestPoint and save their jobs. Accordingly, defendants had no obligation to inform plaintiffs that they had a potential conflict of interest.

D. Fraudulent Omission

The scienter requirement of a claim for fraudulent omission is equivalent to the scienter requirement for all common law fraud actions. *See Skrine*, 292 N.Y.S.2d at 276 (citing *Ochs v. Woods*, 221 N.Y. 335 (1917); *Smith v. Hedges*, 223 N.Y. 176, 184 (1918); *Reno v. Bull*, 226 N.Y. 546 (1919)). Plaintiffs may

satisfy the scienter requirement of their fraudulent omission by a showing of "reckless indifference to error" or "a pretense of exact knowledge". *Id.* (quotations and citations omitted). Thus to succeed on a claim for fraudulent omission, plaintiffs must show by clear and convincing evidence that defendants were more than negligent in their failure to disclose material facts. *See Duggan v. Dep't of Motor Vehicles*, 295 N.Y.S.2d 706, 708-09 (1st Dep't 1968); *see also* Black's Law Dictionary 1271 (6th ed. 1990) ("Recklessness is a stronger term than mere or ordinary negligence"). Plaintiffs can succeed on their fraudulent omission claim only by showing that defendants knowingly or recklessly disregarded the risk of omitting material facts. The trial record does not support such a finding. There is no indication that defendants knowingly omitted material facts from either the February 22 Letter or the Releases. Nor is there clear and convincing evidence that defendants recklessly disregarded the risk that these two documents omitted material facts. Defendants are therefore not liable for fraudulent omission.

IV. Res Judicata and the Preclusive Effect of the Releases

I address defendants' res judicata arguments in order to provide a fully adjudicated trial record from which the parties may appeal.

A. Preclusive Effect of Releases

Defendants maintain that the Releases this Court previously declined to rescind bar plaintiffs' instant claims. *See* Defendants' Trial Memorandum at 5 ("By accepting a 9.3%. rate and releasing their claims under the EPI Program, the plaintiffs gave up any claim to a 5% rate."). This argument

misses the mark. Under New York law, a contract induced by misrepresentation or fraud is void. *See Gilbert v. Rothschild*, 280 N.Y. 66, 71 (1939). The contract itself, be it a Release or an amendment, cannot bar an action based on misrepresentation or fraud. *See Aaron Ferer & Sons Ltd. v. Chase Manhattan Bank*, 731 F.2d 112, 123 (2d Cir. 1984). *See generally* Dan B. Dobbs, *Law of Remedies* § 9.1 at 544-545 (describing torts of negligent misrepresentation and fraud arising out of contracts); Restatement (Second) of Torts § 549 (damages for fraudulent misrepresentation).

Nor are plaintiffs' present claims for damages barred by their previous rescission claim. It is settled law in New York that a party who was induced by misrepresentations to execute a contract of Release has three remedies from which to choose: (1) he may rescind the contract and sue in an action at law; (2) he may bring an equitable action to rescind the contract and in that action obtain full relief; and (3) he may retain what he has received under the fraudulent contract and bring an action at law to recover the damages sustained. *See Goldsmith v. National Container Corp.*, 287 N.Y. 438, 442-443 (1942). *See also duPont v. Perot*, 59 F.R.D. 404, 410 (S.D.N.Y. 1973) (following and quoting *Goldsmith*). Under New York law, a party may pursue simultaneous actions for fraud, misrepresentation and rescission. *See* N.Y. Civ. Prac. L. & R. § 3002(e) (McKinney 1996).

B. Defendants' Res Judicata Arguments

1. Claim Preclusion by Res Judicata or Law of the Case

Defendants contend that the doctrines of res judicata and the law of the case bar plaintiffs from relitigating the instant

claims. *See* Defendants' Trial Memorandum at 1-4 (citing *Woods v. Dunlop Tire Corp.*, 972 F.2d 36, 38 (2d Cir. 1992) (doctrine of claim preclusion bars all attempts to litigate issues that were or could have been litigated at a prior proceeding), *cert. denied*, 506 U.S. 1053 (1993)). These arguments are without merit as plaintiffs have always been prepared to litigate all their claims at one time. It was the defendants who requested that plaintiffs' claims be tried in two separate proceedings.

On December 11, 1995, the parties held a conference before the Court to discuss the unusual posture of this long-running case as it stood at that time. During that conference, Mr. Carling, Defendants' counsel, requested that the Court adjudicate the change of control issue, the mutual mistake issue and the question of attorneys' fees in a separate proceeding before reaching the instant misrepresentation issues. Mr. Carling stated two primary reasons for his request. First, his clients preferred to avoid the publicity of trial: "To avoid that spectacle of [defendants] being tried for fraud, the general counsel of [a] major public company being tried for fraud in front of a jury, we would like to see if it can be avoided by having the equitable trial first." Second, Mr. Carling stated that he believed proceeding in that manner would maximize the possibility of settlement. Transcript of December 11, 1995 Conference at 22-30.

I granted that request based on Mr. Carling's suggestion that such a bifurcation of the plaintiffs' case would increase the chances that the parties would settle their differences without resort to further litigation. It would be fundamentally unjust to allow defendants to defeat plaintiffs' claims now by raising res judicata and law of the case arguments. Despite defendants' arguments, nothing requires the Court to apply these

doctrines to bar plaintiffs' fraud claims. *See Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) (doctrine of res judicata is not a technical rule, but rather a rule of fundamental and substantial justice); *In re PCH Assocs.*, 949 F.2d 585, 592 (2d Cir. 1991) (law of the case doctrine is a rule of practice and not a limit on judicial authority). *See generally* 1B James W. Moore, Moore's Federal Practice ¶¶ 0.404[1], 0.405[1] (2d ed. 1996) (discussing function and underlying policies of res judicata and law of the case doctrines).

2. Collateral Estoppel or "Issue Preclusion"

The doctrine of collateral estoppel (also known as "issue preclusion") provides that when an action between two parties terminates in a valid judgment, a later action between the parties may be affected even though it involves a different claim. *See Levy v. Kosher Overseers Association of America, Inc.*, No. 96-7051, 103, 1997 WL 7687, at *3 (2d Cir. Jan. 9, 1997) (*citing Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 (1979)). *See generally*, Eli J. Richardson, *Taking Issue with Preclusion: Reinventing Collateral Estoppel*, 65 Miss. L.J. 41, 44-53 (1995) (discussing the background and purpose of collateral estoppel law). As a result, findings of fact from prior proceedings in this case must apply to the resolution of plaintiffs' instant claims if (1) the facts of the prior proceeding and the instant proceeding are identical; (2) the findings of fact were actually litigated and decided in a prior proceeding; (3) there was a full and fair opportunity for litigation in the prior proceeding; (4) the fact was necessary to support a valid and final judgment on the merits. *See id.* Defendants argue that such findings of fact bar plaintiffs from bringing their instant claims. *See* Defendants' Trial Memorandum at 1-2; *see also* Oral Arg. Tr. at 23-24.

Specifically, defendants argue that the factual issues of whether defendants acted in good faith in attempting to change the discount rate, and whether plaintiffs suffered any harm as a result of the Releases, have already been adjudicated. *See* Oral Arg. Tr. at 24. Defendants rely on the following portion of the May 13 Opinion to support their collateral estoppel claim:

> The EPI Amendment was intended to give participants the actual present value of their benefits under the EPI Program. *When WestPoint discovered that the Cluett Pension Plan's outdated 5% rate applied to the EPI Amendment, it made a good-faith effort to correct this drafting mistake.* The fact that seven years later this Court determined that WestPoint's efforts were ineffective under ERISA is not proper grounds for rescission. . . . Rescinding the releases would create an entirely unfair result: WestPoint would be forced to pay the *Allen* Plaintiffs nearly twice the market-based present value of their EPI benefits. See Def. Ex. I. Such an outcome would undermine the WestPoint Board's understandable desire to harmonize the payout methodologies used in its various benefit plans. *Moreover, it would provide the Allen Plaintiffs with an undeserved and unintended windfall.*

See Allen, 933 F. Supp. at 268-69 (underlining added; italics in original).[14] If this Court has found that plaintiffs were not

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14. The May 13 Opinion went on to state in a footnote: "At trial, the *Allen* Plaintiffs presented evidence of specific benefits — such as a restricted stock plan — contained in some WestPoint plans that were not available under the EPI Program. Tr. 968. They suggested that the

(Cont'd)

harmed by signing the Releases, that finding collaterally estops plaintiffs from bringing the instant common law claims: if plaintiffs cannot establish that they suffered harm as a result of signing the Releases, they have no viable common law claim."[15]

The question of whether plaintiffs suffered a legally cognizable injury as a result of defendants' conduct must be determined within the context of the contractual relationship between the parties. It would appear at first blush that a fraudulently induced Release that reduced the dollar amount received by plaintiffs upon a change of control constitutes a legally cognizable "harm" sufficient to establish a *prima facie* case for constructive fraud, negligent misrepresentation or fraudulent omission. However, as noted above, the May 13 Opinion explicitly found that the EPI Amendment was intended to provide participants with the actual present value of their benefits under the EPI Program. The May 13 Opinion also found

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(Cont'd)

5% discount rate may have been intended to compensate for such differences. However, there is absolutely no evidence that the inclusion of the 5% rate was anything other than a mistake. Moreover, it is not clear that the benefit plans available to WestPoint's executives were more generous than those provided to Cluett's executives; indeed, Roark, who worked for both companies, testified that the opposite was true. Tr. 1081, 1086." *Allen*, 933 F. Supp. at 269 n.6.

15. Each of plaintiffs' common law claims requires plaintiffs to establish that they relied on defendants' allegedly fraudulent or misrepresentative statements or omissions *to plaintiffs' detriment*. Plaintiffs attempt to satisfy this element by showing that they signed the Releases as a result of defendants' misrepresentations and omissions, and that in turn by signing the Releases plaintiffs lowered the amount of EPI Benefits to which they were entitled upon a change of control. See Part III(A), *infra*.

that using a 5% discount rate would have forced WestPoint to pay plaintiffs nearly twice the market-based present value of their EPI benefits. *See Allen*, 933 F. Supp. at 268. I therefore held that using a 5% discount rate would be "an undeserved and unintended windfall." *Id.* Thus, plaintiffs were not harmed by use of the 9.3% discount rate because that rate satisfied the original intent of the parties — to provide EPI participants with the actual present value of their benefits upon a change of control.

This finding collaterally estops plaintiffs from asserting that they suffered a legally cognizable harm as a result of signing the Releases. The first three prongs of the collateral estoppel test are easily satisfied. First, plaintiffs' instant claims arise out of the same operative facts upon which they brought their action for rescission. Second, this issue has been actually litigated and decided. Third, there can be no question that plaintiffs have had a full and fair opportunity to litigate this issue at the prior proceeding — indeed plaintiffs do not assert otherwise. The only remaining requirement, therefore, is that the finding was necessary to support the judgment on the merits of the rescission claim. The finding that plaintiffs were not harmed by the implementation of the 9.3% discount rate led directly to my conclusion that "[t]he facts presented in this case do not justify rescission, which is a 'drastic' and 'extraordinary' remedy under New York law." *Allen*, 933 F. Supp. at 268. Accordingly, plaintiffs are collaterally estopped from bringing their common law claims because they may not assert that they were harmed by signing the Releases.

Defendants also argue that the May 13 finding that defendants acted in "good faith" in attempting to change the discount rate precludes plaintiffs from asserting here that they

negligently misrepresented material facts. "Good faith" is admittedly an ambiguous term that has been defined to mean, among other things, "an honest belief, the absence of malice and the absence of design to defraud or to seek unconscionable advantage". *Black's Law Dictionary* 693 (6th ed. 1990). Using this definition, it follows that one could act both "in good faith" and "negligently". Furthermore, this May 13 *dicta* did not constitute a ruling on whether the February 22 Letter and Releases constituted a negligent misrepresentation. Because the May 13 Opinion does not clearly find that defendants' "good-faith effort to correct its drafting mistake" included a reasonably diligent effort to inform plaintiffs of all material facts, defendants cannot successfully rely on it to collaterally estop plaintiffs from asserting that defendants acted negligently.

V. Attorneys' Fees

The May 13 Opinion determined that plaintiffs are "entitled to be compensated by WestPoint for their costs and attorneys' fees". *Allen*, 933 F. Supp at 270. However, in light of the extraordinary amount of judicial resources already consumed by this litigation, it makes no sense to calculate the exact amount of attorneys' fees owed at this stage. Defendant WestPoint has announced its intention to challenge this Court's determination that it must pay plaintiffs' attorneys' fees. It would be inefficient to spend time calculating the exact amount of attorneys' fees owed if the appellate court concludes that defendants are not contractually obliged to reimburse plaintiffs for their attorneys' fees. *See* Fed. R. Civ. P. 58 (Advisory Committee Notes, 1993 Amendments) ("Particularly if the claim for fees involves substantial issues or is likely to be affected by the appellate decision, the district court may prefer to defer consideration of the claim for fees until after the appeal is resolved."). Nothing

prevents the parties from appealing this Court's decisions regarding the merits of their claims at this time. *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988) ("[A]n unresolved issue of attorney's fees for the litigation in question does not prevent judgment on the merits from being final."); *Farkas v. Rumore*, 101 F.3d 20, 22 (2d Cir. 1996) (*per curiam*) ("[W]here an order disposes of a party's substantive claims, but does not dispose of claims relating to attorney's fees, the time for appeal of the substantive claims starts to run from the date of the first order unless the district court explicitly grants a delay.") (citation to *Budinich* omitted). Accordingly, the amount of attorneys' fees and expenses to which plaintiffs are entitled will not be determined prior to any appeal.

Conclusion

Plaintiffs have failed to show by clear and convincing evidence that defendants are liable for constructive fraud, negligent misrepresentation and fraudulent omission. Additionally, I find that plaintiffs are collaterally estopped from bringing these claims. Accordingly, it is hereby

ORDERED, DECREED and ADJUDGED that judgment be entered for defendants.

SO ORDERED:

Shira A. Scheindlin
U.S.D.J.

Dated: New York, New York
February 10, 1997

APPENDIX D — EXCERPTS FROM EMPLOYEE RETIREMENT PLAN OF CLUETT, PEABODY & CO., INC. (AS AMENDED THROUGH JANUARY 1, 1985)

EMPLOYEE RETIREMENT PLAN

of

CLUETT, PEABODY & CO., INC.

(As Amended Through January 1, 1985)

(excerpts)

* * *

1.3 "Actuarial Equivalent" means an amount of equal value when computed on the basis of interest, mortality and other tables as shall be adopted from time to time by the Committee on the advice of the Actuary, the current factors being as specified below:

1. *Mortality table* The 1978 GAM Table (which is the 1971 Group Annuity Mortality Table projected to 1978 with Scale E). An average of male and female rates will be used.

2. *Interest rate* 5% per annum, compounded annually.

3. *Other factors* None.

* * *

Appendix D

9.6 Authority and duties of the Committee:

The Committee shall from time to time establish rules for the administration of the Plan and the transaction of its business. Except as herein otherwise expressly provided, the Committee shall have the exclusive right to interpret the Plan and to decide any matters arising thereunder in connection with the administration of the Plan. It shall endeavor to act by general rules so as not to discriminate in favor of any person. Its decisions and the records of the Committee shall be conclusive and binding upon the Company, Participants, and all other persons having any interest under the Plan.

The Committee shall adopt from time to time actuarial tables to be used as the basis for all actuarial calculations and shall determine from time to time the percentum rate or rates of interest to be used as the basis for calculations required in connection with the Plan. As an aid to the Committee, the Actuary appointed by the Committee shall make annual actuarial valuations of the assets and liabilities of the Plan and shall certify to the Committee the tables and rate or rates of interest which he would recommend for use by the Committee. The Committee shall receive and review the periodic valuation of the Plan made by the Actuary.

* * *

Appendix D

9.8 Appeals:

The Plan managers shall make all determinations as to the right of any person to a benefit. Any denial by a Plan Manager of a claim for benefits under the Plan by a Participant or a Beneficiary shall be stated in writing by the Plan Manager and delivered or mailed to the Participant or Beneficiary; and such notice shall set forth the specific reasons for the denial, written to the best of his ability in a manner that may be understood without legal or actuarial counsel. In addition the Plan Manager shall afford a reasonable opportunity to any Participant or Beneficiary whose claim for benefits has been denied for a review of the decision denying the claim. Such a Participant or Beneficiary shall have the right within 60 days of such decisions to appeal such decision to the Committee. A decision by the Committee shall be final and binding on all parties concerned.

APPENDIX E — EXCERPTS FROM AMENDED AND RESTATED DEFERRED COMPENSATION AGREEMENT

AMENDED AND RESTATED
DEFERRED COMPENSATION AGREEMENT (excerpts)

AMENDMENT AND RESTATEMENT made as of the 1st day of March 1984, of the DEFERRED COMPENSATION AGREEMENT made as of the 1st day of July, 1976 (as amended and supplemented), by and between CLUETT, PEABODY & CO., INC., a corporation with its principal place of business at 510 Fifth Avenue, New York, New York 10036, and Robert D. Krumme, residing at 98 Larchmont Avenue, Larchmont, NY 10538 (the "Executive").

. . .

Deferred Compensation means the payments to be made to the Executive pursuant to this Agreement following the termination of the Period of Employment.

. . .

9. The rights of the Executive to the Deferred Compensation and of the Beneficiary to the Contingent Deferred Compensation shall be solely those of unsecured creditors of Cluett. No assets acquired or held by Cluett, whether or not in connection with the obligations assumed by it hereunder, shall be deemed to be held under any trust for the benefit of the Executive or the Beneficiary or to be security for the performance of the obligations of Cluett, but shall be and remain a general, unpledged and unrestricted assets of Cluett.

APPENDIX F — EXCERPTS FROM AMENDMENT TO DEFERRED COMPENSATION AGREEMENT

AMENDMENT TO DEFERRED COMPENSATION AGREEMENT (excerpts)

This AMENDMENT made as of the 11th day of November, 1988 of the AMENDED AND RESTATED DEFERRED COMPENSATION AGREEMENT (the "Deferred Compensation Agreement") made as of the 1st day of March, 1984, by and between CLUETT, PEABODY & CO., INC. ("Cluett") and Robert D. Krumme (the "Executive");

. . .

4A.

(1) (c) The term "Actuarial Equivalent" means, with respect to an Accrued Benefit, and Deferred Compensation (or Contingent Deferred Compensation, as the case may be) benefit provided under the terms of this Agreement which has the same present value as the Accrued Benefit. For the purpose of establishing whether a benefit is the Actuarial Equivalent of another benefit the actuarial assumptions contained in Cluett's Employee Retirement Plan shall be employed for so long as that Plan remains in existence and if such Plan is no longer in existence, the actuarial assumptions last used by such Plan shall be used.

. . .

(2) Notwithstanding any other provision of this Agreement, upon the occurrence of a Change in Control the Executive (or the Executive's Beneficiary if the Beneficiary is then receiving Contingent Deferred Compensation payments)

shall be paid in a lump sum a benefit equal to the Actuarial Equivalent of the Executive's (or such Beneficiary's) Accrued Benefit as of the Change in Control Date, provided that the Executive's (or such Beneficiary's) rights to payments hereunder shall not have been forfeited under the provisions of Section 6 or Section 7 hereof, such lump sum payment to be made within 60 days of the Change in Control Date.

. . .

16. If at any time upon or after a Change of Control there should arise any dispute as to the validity, interpretation or application of any term of condition of this Agreement, or any Internal Revenue Service determination that the benefits under the Agreement constitute 'excess parachute payments' within the meaning of Section 280G(b) of the Code, subject to an excise tax under Code Section 4999, Cluett agrees, upon written demand by an Executive, to provide sums sufficient to pay on a current basis (either directly or by reimbursing the Executive or his legal representative) the Executive' costs and reasonable attorneys' fees (including expenses of investigation and disbursements for fees (including expenses of investigation and disbursements for the fees and expenses of experts, etc.) (a) incurred by the Executive in connection with any dispute or litigation, regardless of whether the Executive is the prevailing party, involving any provision of this Agreement, provided that the court in which such litigation is pursued determines, upon application of any party, that the Executive or his legal representative did not initiate frivolously such litigation, or (b) incurred by the Executive in connection with any Internal Revenue Service challenge concerning the status of benefits paid hereunder as 'excess parachute payments' subject to an excise tax. Under no circumstances shall the Executive or his

legal representative be obligated to pay or reimburse Cluett for any attorney's fees, costs or expenses incurred by Cluett. The provisions of this Section shall survive the expiration or termination of this Agreement and of the Executive's employment.

APPENDIX G — LETTER DATED FEBRUARY 16, 1989 FROM STEVEN A. HARROLD OF THE ACTUARIAL FIRM TPF&C TO BARRY F. SHEA, TREASURER OF WEST POINT - PEPPERELL, INC.

[Letterhead of TPF&C]

February 16, 1989

Mr. Barry F. Shea
Treasurer
West Point Pepperell
Post Office Box 71
West Point, Georgia 31833

Dear Barry:

One of our assignments, as Actuary to the Cluett, Peabody & Co., Inc. Retirement Plan, is to recommend to the Management Pension Committee the actuarial equivalence bases needed from time to time to convert one form of annuity benefit to another such form, or to a lump sum amount. This letter provides our recommendation for converting certain monthly annuities to lump sum amounts.

Section 13.2 of the Cluett plan provides for the conversion of monthly annuities of $100 per month or less to lump sum amounts. The document does not, however, provide for the payment of lump sum amounts if the monthly annuity is more than $100 a month. It is our recommendation that the actuarial equivalence basis used in the two West Point Pepperell qualified plans for lump sum payments be adopted for the Cluett plan. This actuarial equivalence basis is the one adopted for use in calculating amounts for lump sum payments under the recent Retirement Enhancement Program for participants in the Cluett plan.

Appendix G

The West Point Pepperell actuarial equivalence basis uses a "current" interest rate to convert monthly annuities to lump sum amounts. Before 1984, the West Point Pepperell plans used the greater of the Moody's AAA Bond Index and 10% for the interest rate. Now, the rate is defined as 120% of the PBGC immediate interest rate, unless the lump sum amount is less than $25,000. In the latter case, the lump sum is recalculated using the PBGC immediate interest rate, but the resulting lump sum is not permitted to exceed $25,000. The PBGC immediate rate during February 1989 is 7-¾%; 120% of that rate is 9.30%.

The Mortality basis used for the lump sum factors in the West Point Pepperell plans is one derived especially for West Point Pepperell by TPF&C, and is intended to be representative of West Point Pepperell's expected future mortality experience.

If you have any questions about this recommendation or would like to discuss this matter in more detail, please contact me.

Sincerely yours,

Steven A. Harrold

APPENDIX H — MINUTES OF FEBRUARY 16, 1989 MEETING OF WEST POINT-PEPPERELL, INC. MANAGEMENT PENSION COMMITTEE, ACTING AS THE COMMITTEE FOR THE CLUETT EMPLOYEE RETIREMENT PLAN

MEETING OF WEST POINT PEPPERELL MANAGEMENT PENSION COMMITTEE

On February 16, 1989, a meeting of the Management Pension Committee of West Point-Pepperell, Inc., was held at the Company's offices at the McGraw-Hill Building in New York City. Present were Messrs. J. L. Lanier, Jr., Clayton S. Sauers, C. Powers Dorsett and Barry F. Shea, constituting a quorum of the Committee. Mr. Dorsett acted as secretary for the Committee.

The purpose of the meeting was to consider the recommendation of TPF&C set forth in the letter dated February 16, 1989, addressed to Mr. Shea from Steven A. Harrell of TPF&C, a copy of which is attached to these minutes. After discussion of TPF&C's recommendation that the Cluett, Peabody & Co., Inc. Retirement Plan use the actuarial equivalence basis used in the West Point Pepperell qualified plans for lump sum payments, it was the unanimous decision of the Committee acting as the retirement committee under the Cluett, Peabody & Co., Inc. retirement plan to adopt TPF&Cs recommendation for such purposes.

There being no further business to come before the meeting, it was adjourned.

APPENDIX I — DEFERRED COMPENSATION AGREEMENT ELECTION FORM

DEFERRED COMPENSATION AGREEMENT ELECTION FORM

CHECK APPROPRIATE BOX

[ ] I understand that, as a result of the amendment dated November 11, 1988, to the Deferred Compensation Agreement between Cluett, Peabody & Co., Inc., and me, in the event of a change in control of West Point-Pepperell, Inc., I am entitled to receive in a lump sum payment the actuarial equivalent of my deferred compensation benefit under the Agreement. I understand that this lump sum will be calculated using a discount rate equal to 120% of the then current PBGC immediate interest rate, unless the lump sum amount is less than $25,000. If the lump sum amount is less than $25,000 using the above rate, the lump sum is to be recalculated using the PBGC immediate annuity rate, but the resulting lump sum is not to exceed $25,000. **I elect to have my deferred compensation benefit paid as a lump sum in the event of a change in control.** I understand that the lump sum payment of the actuarial equivalent of my deferred compensation benefit will be in full satisfaction of all obligations of West Point-Pepperell, Inc., as successor to Cluett, Peabody & Co., Inc., under the terms of my Deferred Compensation Agreement, and that in accepting a lump sum payment I shall thereby release West Point-Pepperell, Inc., its Directors, officers, employees, and agents, and its successors and assigns, from all obligations under the Agreement.

Appendix I

[ ] I understand that, as a result of the amendment dated November 11, 1988, to the Deferred Compensation Agreement between Cluett, Peabody & Co., Inc., and me, in the event of a change in control of West Point-Pepperell, Inc., I am entitled to receive in a lump sum payment the actuarial equivalent of my deferred compensation benefit under the Agreement. **I elect to revoke the November 11, 1988, amendment so that I will defer** receipt of my deferred compensation benefit pursuant to the terms and conditions of **the Agreement in effect prior to the November 11, 1988, amendment.**

_____

Signature

_____

Date

APPENDIX J — EXCERPTS FROM TRANSCRIPT OF DEPOSITION OF STEVEN A. HARROLD ON JULY 27, 1989

Deposition of STEVEN A. HARROLD, a non-party witness, taken by Plaintiff, pursuant to Subpoena, on July 27, 1989 (excerpts).

Q. And have there been persons who have left the company after February 16th, who received lump sum benefits?

A. Yes, sir.

Q. And have those people been paid out in lump sum under the $3,500 limit, using a five percent interest assumption or a 9.3 percent interest assumption?

A. A blend.

Q. A blend?

A. Yes.

Q. Would you please explain what you mean by a blend?

A. Sure. The benefits under the rules imposed by Congress and the Internal Revenue Service on qualified pension plans, the amount of the benefit earned up through a change date cannot be taken away from an individual.

The particular name given to what can't be taken away is an accrued benefit. So if you were to have a benefit that says you get $100 a month, if you have earned that through February 16th, the company can't change the formular such as that $100 a month is reduced.

Appendix J

Q. If they can't change the formular —

MR. TISMAN: I don't believe the witness is done.

A. The company could change the formular so that your benefit would have been $50 a month, but since you had already earned it before the formular was changed, that extra $50 is grandfathered for you.

Recent legislation has said not only is the amount of the benefit grandfathered for you, but some other attributes of the plan are also grandfathered.

For example these early retirement factors. As long as the benefits have been earned. So the fact is the lump sum actuarial equivalent basis grandfathered.

So the benefit earned up to February 16, 1989, under the qualified plan, will attract an interest rate of five percent. The amount of the benefit earned after February 16th will attract a benefit of 9.3 percent. I'm sorry not attract an interest rate of 9.3, it will attract an interest rate according to the West Point market rate factors.

DEC 4 PAGE 3

No. 98-585

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1998

ROBERT D. KRUMME, *et al.*,

Petitioners,

vs.

WESTPOINT STEVENS INC., formerly known as WEST POINT-PEPPERELL, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari in the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioners respectfully submit this reply brief in support of their petition for a writ of certiorari. In its Brief in Opposition ("Resp. Br."),[1] WestPoint attempts to downplay the importance and effect of the Court of Appeal's decision by arguing that the decision involves idiosyncratic circumstances and does not conflict with prior rulings of this Court or other Courts of Appeals, or with the regulatory scheme governing pension plans. WestPoint is wrong.

I. THE SECOND CIRCUIT'S DECISION HAS WIDE-RANGING IMPLICATIONS

There is nothing idiosyncratic about the questions presented in the Petition. By allowing an employer to retroactively decrease pension benefits by altering assumptions that are required by law to be specified in a pension plan, without amending the plan and without abiding by the "anti-cutback" provisions of ERISA and the Internal Revenue Code ("IRC"), the Second Circuit has issued a ruling that will adversely affect every pension plan. If the Second Circuit's decision remains the law, any employer can easily circumvent the regulatory framework requiring benefit specificity and certainty by the mere expedient of adopting a provision allowing the employer to change "from time to time" fixed benefit terms and factors without triggering the safeguards that attend plan amendments.

WestPoint also contends that resolution of the questions presented would involve a primarily factual inquiry that this Court should avoid, and that a reversal of the Court of Appeals' decision would affect only Petitioner Krumme. These contentions are also wrong. The questions presented raise issues of law. Indeed, the issue of WestPoint's authority to alter the discount rate was resolved as a matter of law by the District Court upon cross-motions for summary judgment. App. 68a-73a. The Court of Appeals similarly ruled as a matter of law that the Cluett Committee validly adopted a 9.3% discount rate. App. 32a.

WestPoint wrongly cites *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 85 (1995) for the proposition that determining "whether a plan sponsor has complied with procedures for changing a plan 'depend[s] on a fact-intensive inquiry' " that is inappropriate for this Court. The Curtiss-Wright pension plan, however, merely designated the "company"

1. Petitioners' Petition for a Writ of Certiorari will be cited herein as "Pet." The Appendix to the Petition for a Writ of Certiorari will be cited as "App." The Respondents' Appendix will be cited as "R. App." Other terms or words used herein are as defined in the original Petition.

as the amending authority. It thus required a factual inquiry under corporate law principles to determine who had authority to act for the "company" and whether the authorized persons had acted to amend the plan. In contrast, the Cluett Plan specifically designates the board of directors as the exclusive authority to amend the Cluett Plan, and it is uncontroverted that they did not act to amend the actuarial factors contained in the Cluett Plan. App. 10a, 52a.

WestPoint's contention that a reversal of the Second Circuit's decision would benefit only Petitioner Krumme because other employees signed releases is inexplicable. If this Court were to ultimately determine that WestPoint's rate change was invalid, the case would necessarily be remanded to the Court of Appeals to address various other issues, including the validity of certain releases, which it did not reach in its decision.[2]

More importantly, the Second Circuit's holding applies not only to petitioners but prospectively to every pension plan. In this regard, WestPoint's remark that the present dispute could not recur, Resp. Pet. 8, is baseless. If the Second Circuit decision remains good law, any employer may now add to its pension plans a provision allowing it to decrease accrued benefits by changing benefit-determinative provisions or factors "from time to time," without amendment and without being restricted by ERISA's and the IRC's anti-cutback provisions.

II. THE COURT OF APPEAL'S DECISION DIRECTLY CONFLICTS WITH *DOOLEY v. AMERICAN AIRLINES, INC.*

WestPoint recognizes — as the Second Circuit did not — that the American Airlines pension plan in *Dooley* did not comply with 79-90. WestPoint attempts to distinguish *Dooley*, however, by contending that the Cluett rate change was specified in a plan document, *i.e.*, the Committee minutes, while the American Airlines rate change was not. The cases are not susceptible to such a distinction. In *Dooley*, the Seventh Circuit ruled that the American Airlines plan did not comply with 79-90

2. In the District Court, the *Allen* plaintiffs contended that certain releases were procured by WestPoint through fraud or mutual mistake. Contrary to WestPoint's contention, Resp. Br. 11, the District Court found that the releases resulted from mutual mistake, but nevertheless declined to rescind them because it imputed to the *Allen* plaintiffs an intent to have a 9.3% discount rate used to calculate their benefits. On appeal, the *Allen* plaintiffs contended that the District Court's imputation of intent was erroneous as a matter of law. The Court of Appeals did not address the release issue, since it found that the discount rate was validly changed in any event.

solely because its grant of authority to change the discount rate "from time to time" without a plan amendment violated the anti-discretion provision of 79-90. The Seventh Circuit might also have found that 79-90 was violated because the American Airlines plan failed to specify the changed rate in the plan document — but it did not. Rather, the Seventh Circuit explicitly based its holding on the plan's failure to comply with the "employer discretion prohibitions" of 79-90 and explicitly refrained from determining whether the bulletins that contained the changed rate were part of the American Airlines plan. 797 F.2d at 1451 n.6, 1452-53. In short, the Seventh Circuit found that the discretionary language of the American Airlines plan failed to comply with 79-90, while the Second Circuit found that identical language in the Cluett Plan did not. The resulting conflict is direct, material and irreconcilable.[3]

III. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THE REGULATORY SCHEME FOR SAFEGUARDING PENSION BENEFITS

The IRC and ERISA establish a finely reticulated scheme by which a plan sponsor is required to specify actuarial factors for determining benefits in the plan document, where they can be altered only by a plan amendment. Such an amendment must then comply with various safeguards, including ERISA's notice provisions, 29 U.S.C. § 1054(h), and ERISA's and the IRC's prohibition against retroactive reductions of accrued benefits, 29 U.S.C. § 1054(g); 26 U.S.C. § 411(d)(6). WestPoint's attempt to demonstrate that the Second Circuit's decision does not offend this regulatory scheme fails for numerous reasons.

A. The Second Circuit's Decision Allows an Employer to Circumvent 79-90's Requirements

WestPoint contends that the IRC's pension plan provisions are "voluntary," and that an employer's failure to comply with them merely jeopardizes a pension plan's tax benefits. Resp. Br. 12-14. That view is unrealistic in general, inapplicable to the case at bar in particular, and ignores the broader implication of the Second Circuit's decision.

Although an employer could theoretically choose not to comply with the IRC pension plan provisions — as is the case for "top-heavy" plans for senior executives — the consequences of noncompliance by a

3. WestPoint also argues that the Second Circuit cited four other federal decisions in accord with *Dooley*. Resp. Br. 19. None of those cases, however, implicated a provision like 79-90 and 26 U.S.C. § 401(a)(25), that prohibited employer discretion. *See* Pet. 18.

company-wide pension plan like the Cluett Plan would be devastating to both the employer and employees. The employer would lose the deductibility of pension contributions, employees would be faced with taxation of accrued benefits before receiving benefit payments and lump sum payments could not be rolled into tax-deferred accounts. Company-wide pension plans are thus universally designed and operated to comply with the IRC and are represented to employees as providing tax-deferred pension benefits. The present case is an example of a sponsor's efforts to insure IRC compliance. After 79-90 was issued, the Cluett Plan was amended in December 1983, prior to the end of 79-90's grace period, by specifying in the Plan document the 5% discount rate and the applicable mortality table specifically to comply with 79-90. That the 1983 amendment was intended to comply with 79-90 could not be controverted below, as Cluett's filing of the 1983 amendment with the Internal Revenue Service by defendant Roark's own Human Resources Department explicitly stated that the amendment was adopted "to comply with Revenue Ruling 79-90." App. 7a n.4. Thus, WestPoint's contention that it could have chosen not to comply with 79-90 and 26 U.S.C. § 401(a)(25), is irrelevant. The Cluett Plan was meant to comply and the Second Circuit should have construed it accordingly.[4]

Most importantly, if the Second Circuit's decision remains good law, an employer will no longer need to choose between complying with 79-90 and 26 U.S.C. § 401(a)(25), or suffering the substantial tax detriment of noncompliance. Under the Second Circuit's interpretation of 79-90, an employer can now retain the discretion to change actuarial factors "from time to time" without a plan amendment and thereby retroactively reduce accrued benefits, yet still retain a plan's tax qualification. This is precisely the state of law that 79-90 and 26 U.S.C. § 401(a)(25) were designed to change some fifteen years ago.

B. The Second Circuit's Decision Conflicts with ERISA

Contrary to WestPoint's contention, the Second Circuit's decision severely undermines ERISA's anti-cutback provision, 29 U.S.C.

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4. WestPoint argues that its adoption of a discount rate based on a variable standard satisfied 79-90, since 79-90 itself recognized the propriety of such rates. Resp. Br. 14. It was not the PBGC-based rate per se, however, that violated 79-90. Rather, the anti-discretion provision of 79-90 and 26 U.S.C. § 401(a)(25) was violated because the rate was purportedly adopted by discretionary committee action without a plan amendment. The specificity requirement was violated because the PBGC-based rate was never included in the Cluett Plan document.

§ 1054(g). WestPoint argues that the anti-cutback provision — which prohibits a retroactive decrease of accrued benefits by plan amendment — was not triggered here, since the Second Circuit allowed a change in the discount rate without a plan amendment. Resp. Br. 16. WestPoint's argument only proves the point. 79-90 requires an amendment, which in turn activates the anti-cutback prohibitions of ERISA and the IRC. The Second Circuit's decision emasculates ERISA's ability to prevent retroactive decreases of accrued benefits precisely because it allows an employer to change without a plan amendment the actuarial factors specified in a plan document.

WestPoint further contends that it did not violate the anti-cutback provisions in administering the Cluett Plan, since it employed a "split" or "blended" discount rate, *i.e.*, it continued to use the 5% rate to value benefits accrued before the discount rate change and applied the new rate to benefits that accrued subsequently. Resp. Br. 16. By this argument WestPoint seeks to distance itself from the Second Circuit's decision. The Second Circuit explicitly ruled that, because the rate change was effected without a plan amendment, WestPoint did not need to use a blended rate and could apply the new rate retroactively. App. 32a. That WestPoint now contends that it nevertheless did not retroactively reduce accrued Cluett Plan benefits is an implicit acknowledgment that the Second Circuit's decision is untenable.[5]

WestPoint also argues that ERISA's anti-cutback prohibitions were not violated in the present case, since petitioners sued under a non-ERISA-qualified "top-hat" plan. WestPoint is being disingenuous and is simply wrong. Although petitioners' benefits derived from the non-qualified EPI Program, the EPI Program explicitly employed the actuarial factors "contained in" the qualified Cluett Plan. Thus, the Court of Appeal's decision and the questions presented to this Court relate solely to WestPoint's authority to change the factors in the Cluett Plan and directly implicate the ERISA and IRC provisions that govern the tax and ERISA-qualified Cluett Plan. WestPoint's "top-hat" argument was raised and rejected out of hand in both the District Court and the Court of Appeals. App. 32a n.17, 69a.

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5. WestPoint's argument also highlights the complete illogic and error of the Second Circuit's decision. While WestPoint now contends it used a "split" discount rate for the Cluett Plan and did not retroactively apply the new rate, the Second Circuit's decision retroactively applied the new rate to the EPI benefits even though the EPI Amendment states that it must employ the factors "contained in" the Cluett Plan.

WestPoint also argues that the anti-cutback provisions were not violated because there were no "accrued benefits" under the "EPI Amendment" to be improperly reduced. First, the Second Circuit's decision does not rest on any peculiarity of the EPI Program. Rather, it allows the qualified Cluett Plan and every other qualified plan to retroactively reduce accrued benefits. Second, WestPoint's argument is deceptively bottomed on the assumption that the Court will overlook the difference between "accrued benefits" and alternative ways of valuing and paying such benefits. At the time the present dispute arose, the Cluett "EPI Program" already provided accrued benefits to the petitioners, and WestPoint's contrary argument is based on an intellectually dishonest misuse of terms. The normal form of benefit under the "EPI Program" was an annuity-type annual benefit that accrued as an employee's service time and salary increased. App. 5a. By 1989, this normal form of benefit was accrued and vested for each petitioner, most of whom had retired and were already receiving annuity-type benefits. In Mr. Krumme's case, for example, his benefits had fully accrued and vested by April 1996 when he left Cluett, some three years before the EPI Amendment was executed. The "EPI Amendment" to the "EPI Program" merely added an alternative form of payment, *i.e.*, a lump sum, that would be triggered upon a change in control of WestPoint. The Cluett Plan was closely analogous to the EPI Program, in that its benefit accrued over the employee's work life, it was payable in normal form as an annuity-type payment and it also provided a limited lump sum optional form of payment that could be triggered only upon an employee's retirement.

Under ERISA and the IRC, an accrued benefit is defined as the annual form of benefit. *See*, 26 U.S.C. § 411(a)(7)(A); 29 U.S.C. § 1002(23). Thus, when WestPoint argues that there were no "accrued benefits" under the "EPI Amendment" (which merely added an alternative form of payment), WestPoint is being intentionally misleading. The "accrued," annuity-type benefit was provided in the core "EPI Program." Since the lump sum alternative payment method established by the EPI Amendment required that the lump sum be calculated employing actuarial assumptions "contained in" the Cluett Plan, the EPI Participants should have received indirectly by contract the same benefit safeguards provided by both ERISA and the IRC for the Cluett Plan benefits — namely that the actuarial factors could not be retroactively changed to reduce optional lump sum forms of payment based on the annuity-type benefit. *See* 26 C.F.R. § 1.411(d)-3(b); Pet. 14. It is this very misuse of the Cluett Plan that is at issue here.

C. The Second Circuit's Decision Conflicts with *Curtiss-Wright* and *Frank v. Colt Industries, Inc.*

WestPoint's attempt to harmonize the Second Circuit's decision *with Curtiss-Wright Corporation* v. *Schoonejongen*, 514 U.S. 73 (1995) and *Frank* v. *Colt Industries, Inc.*, 910 F.2d 90 (3d Cir. 1990) is unavailing. WestPoint contends that the Cluett Committee minutes were "incorporated" into the Cluett Plan pursuant to a plan provision that makes such minutes "conclusive and binding" and therefore satisfies *Curtiss-Wright's* and ERISA's requirement that a pension plan be contained in a written document. Resp. Br. at 16-17. Such language does not support the claimed incorporation by reference, particularly here, where the Cluett Plan explicitly defined itself as comprised of a particular document and its amendments.[6] The Cluett Plan not only defined itself but explicitly provided for its amendment *exclusively* by the board of directors.[7] WestPoint could not, consistent with *Curtiss-Wright*, and *Colt Industries*, alter the actuarial factors physically specified in the defined plan document through Committee action that admittedly did not comply with the Plan's exclusive amendment procedure.

Petitioners have never argued, as WestPoint contends, Resp. Br. 17, that a pension plan must be contained in a single written document. Indeed, even the Cluett Plan consisted of a document created in 1986 and a number of subsequent amendments. But petitioners do contend, and *Curtiss-Wright*, *Inter-Modal Rail Employees Association* and *Colt Industries* require that where, as here, a plan is explicitly defined and a precise, exclusive amendment procedure is provided, committee minutes

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6. Section 1.26 of the Cluett Plan provides:

> Plan means the Employee Retirement Plan of Cluett Peabody & Co., Inc. as amended and restated as set forth herein, and as it may hereafter be amended from time to time.

Indeed, early in this case, WestPoint stipulated that the Cluett Plan included the 1986 document and its subsequent amendments, but did not include the Committee minutes. The Court of Appeals did not address this stipulation or the Cluett Plan definition.

7. Section 9.1 of the Cluett Plan provides in relevant part:

> The Company acting through the Board of Directors shall have sole authority . . . to amend or terminate in whole or in part, the Plan or the Trust.

Section 11.1 of the Cluett Plan also reserves to the board of directors alone the right to amend the Plan. *See* App. 8 a 7 n.5.

that conflict with terms contained in the defined plan document and that resulted from action that did not comply with the exclusive amendment procedure are not plan documents.

WestPoint's attempt to further distinguish *Colt Industries* because the Colt pension plan was an "integrated" document also fails. Resp. Br. 20-21.[8] The Cluett Plan also explicitly defined itself. As in *Colt*, where the employer has created an identifiable document that sets forth the terms of a benefit plan,

> not every internal document containing a reference to management's interpretation of the plan [like the committee minutes here and in *Colt*] should be regarded as part of the plan itself. Where a plan has complied with ERISA by setting forth a method for accomplishing amendment, of course each putative amendment will be evaluated by reference to that method.

910 F.2d at 98. As in *Colt*, the Committee action in the present case concededly did not amend the Cluett Plan, and the minutes of such ineffective Committee action cannot be deemed part of the plan document.

Finally, WestPoint contends that the distinction between discretionary, administrative action and amendatory action that was recognized in *Curtiss Wright, Varity Corp. v. Howe*, 516 U.S. 489, 498 (1996) and *Lockheed Corporation* v. *Fink*, 517 U.S. 882, 890-91 (1996) is not relevant to the present case since a rate change by the board amendment would also have been "discretionary." Resp. Br. 18. Yet, any plan amendment is "discretionary" in the general sense WestPoint alludes to, since the amending authority always has a choice whether or not to adopt the amendment. In the context of ERISA, however, discretionary, administrative action is distinguished from amendatory action. For example in *Lockheed*, the Lockheed board surely had "discretion" to adopt or not adopt the early retirement amendments in dispute in that case. Yet this Court held that the board's amendatory action was not the type of administrative, discretionary action that created a fiduciary duty under ERISA . *Lockheed*, *supra*, 517 U.S. at 890. WestPoint's reliance on a dictionary definition of the word "discretionary" wholly fails to distinguish this Court's prior decisions, which are based on the language of ERISA. *See* 29 U.S.C. § 1002(21)(A).

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8. WestPoint's contention that petitioners did not cite *Frank* v. *Colt Industries Inc.* in their Second Circuit briefs, Resp. Br. 20, is simply wrong. The case was both cited and included in the table of authorities of the *Allen* Plaintiffs' Brief.

IV. PETITIONERS DID NOT FAIL TO PURSUE AN ADMINISTRATIVE REMEDY

WestPoint contends that certiorari should not be granted because petitioners failed to pursue their administrative remedies under § 9.8 of the Cluett Plan, R. App. 66a. The contention is frivolous.

First, § 9.8 of the Cluett Plan only provides for an administrative appeal where a claim for benefits under the Cluett Plan has been denied. Petitioners have never asserted a claim for benefits under the Cluett Plan. Rather they have asserted a claim for breach of the EPI Program, a separate agreement that employed the actuarial assumptions contained in the Cluett Plan and thus required an interpretation of the Cluett Plan. The EPI Program did not incorporate the administrative appeal process of the Cluett Plan nor did the EPI Program itself provide for an administrative appeal.

Second, the Cluett Plan itself never actually used the 9.3% discount rate approved by the Second Circuit. Indeed, during the period that WestPoint remained in control of the Plan, by its own admission it used a split discount rate to calculate lump sum benefits under the Cluett Plan. R. App. 16. After WestPoint sold Cluett's assets in 1993, the new owner employed the 5% discount rate that petitioners always claimed to be the correct rate. These facts make even more troubling the Second Circuit's decision. Although the petitioners' EPI benefits were to be determined by employing the discount rate contained in the Cluett Plan, the Second Circuit's decision requires the benefit to be calculated with a straight 9.3% discount rate that WestPoint now claims it never used for the Cluett Plan.

V.

THE SECOND CIRCUIT'S DECISION IS WRONG

WestPoint contends that sections 9.6 and 1.3 of the Cluett Plan authorized the Committee to change actuarial factors for determining benefits without a Plan amendment. Resp. Br. at 21-22. The infirmity of this argument as it pertains to § 1.3 has already been fully addressed. Section 9.6 suffers from the further infirmity that it does not control the calculation of pension benefits. The "annual" actuarial valuations and rate adjustments referred to in § 9.6 relate to factors and discount rates used to set *funding* levels. Although § 9.6 on its face and in isolation could be read more expansively, § 1.3 specifically dictates the discount rate to be used in calculating plan *benefits*. Indeed, in the Joint Pre-Trial Order in the Krumme action, WestPoint explicitly stipulated that the discount rate in dispute was the rate contained in § 1.3.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that a writ of certiorari issue to review the judgment of the Second Circuit.

Respectfully submitted,

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